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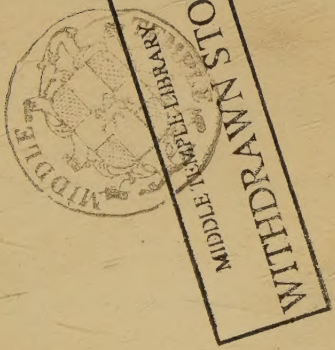


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THE

# PRACTICE OF SALES

OF

## REAL PROPERTY,

WITH

## PRECEDENTS OF FORMS,

COMPRISING

PARTICULARS AND CONDITIONS OF SALE, CONTRACTS, CONVEYANCES, ASSIGNMENTS, DISENTAILING DEEDS, AND EVERY MODE OF ASSURANCE FOR CONVEYING LANDED PROPERTY.

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IN TWO VOLUMES.

VOL. I.

**SECOND EDITION ENLARGED.**


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# PREFACE

## TO THE SECOND EDITION.

The favourable manner in which the former Edition of this Work was received has induced the Author to submit a Second Edition to the Profession. In order to render it still more practically useful, he has deemed it desirable to revise the Work throughout. He trusts that the result of the labours which have been bestowed, during the interval since it has been out of print, will compensate for the delay in its second appearance. The whole treatise has been thoroughly revised, and many alterations have been made in the arrangement of the chapters, sections, and paragraphs, which appear to be improvements. Some subjects, also, which, in the former Edition, were only partially treated, have been materially enlarged. A considerable portion of new matter has been introduced; all the cases bearing upon the subject which have been determined, and statutes passed, since the publication of

the former Edition, have been inserted and a great number of additional Precedents have been supplied, so that the reader will, it is apprehended, have no difficulty in selecting a form adapted to every kind of assurance affecting the Sale and Conveyance of Real Property.

PLYMOUTH,
*November* 1*st*, 1849.

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A

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ON THE

# LAW OF CONTRACTS

RELATING TO

# REAL PROPERTY.

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I. Proceedings preliminary to the Sale.

1. *Ascertainment of Value.*
2. *Investigation of the Title.*
3. *Advertising the Property.*
4. *Practical Directions for framing the Particulars and Conditions of Sale.*

Chap. I.

*Preliminary proceedings.*

The laws relative to the sale and conveyance of real property may, we think, be best investigated by taking up the subject at its very earliest stage; commencing in fact from the time at which the client first goes to his solicitor and says, "Sell this property for me," to the actual completion of the purchase. To effect this, it will be requisite, first, to take into consideration those matters which usually precede the contract; then the contract itself, as well as the capacity of the contracting parties; and afterwards minutely to trace the subject through all its various and intricate details, until the sale is finally consummated by the actual conveyance to the purchaser.

*Preliminary proceedings.*

Importance of careful arrangement of preliminary matters.

A careful conduct of the preliminary matters is ever of the greatest importance, as a very trifling oversight at the commencement may cause a series of difficulties, and those often accompanied with expense as well as delay throughout the whole course of the transaction, which a little early care and foresight might have prevented. These preliminary proceedings may be ranked under the four following heads: viz.—1. The ascertainment of the value of the property which is to be the subject-matter of sale. 2. The investigation of the title of that property. 3. The advertisements. And, 4. The manner in which the contract or conditions of sale, under which it is to be sold, should be prepared.

## 1. *Ascertainment of Value.*

Ascertainment of value.

The value of the property may sometimes be arrived at without much trouble or difficulty, particularly if it has been the subject of repeated sales, and has for a series of years undergone but few alterations. But when, on the other hand, it has been the subject of a variety of changes, the task becomes far more difficult. During the last twenty or thirty years, many barren tracts of country have been inclosed, and brought into different degrees of cultivation; some to the great advantage of the improvers, whilst others have afforded a very inadequate return for the immense labour and vast sums of money that have been expended upon them. Some lands presenting but a sterile and unprofitable surface, contain rich mines of hidden wealth beneath; and others, though of small importance in their present state, may eventually become so, in consequence of offering a favourable situation for buildings or other improvements. To arrive at the true value of property thus situated must always be attended with

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*Preliminary proceedings.*

difficulty. The annual sum it produces at rack-rent affords at best but an uncertain criterion, as the utmost it can accomplish is to speak of the then present surface value. In cases of this nature, therefore, the advice of surveyors and other scientific persons should always be taken; as few, if any, professional gentlemen, however well stored their minds may be with legal lore or general information, can be capable of arriving at a just conclusion in matters of this kind, particularly in a locality they are unacquainted with.

Facilities for ascertaining parcels by surveys under Tithe Commutation Act.

A great facility has, however, been latterly afforded throughout the kingdom for procuring estates to be surveyed, valued, and mapped by means of the surveys taken under the Tithe Commutation Act (6 & 7 Will. 4, c. 71; 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 32), forming, in fact, a kind of Domesday book for future generations, which seems likely, in many ways, to prove highly beneficial to the present and future proprietors of landed property.

### 2. *Investigation of Title.*

Advantages of previously investigating title.

The too prevailing practice of the vendor's solicitor delaying to investigate his client's title until the latter, by signing the contract for its disposal, has bound himself to furnish it unconditionally, has sometimes been productive of the most serious consequences, whilst its usual results are delays, rarely unattended with expense often considerable, and always annoying; nor are instances wanting in which a neglect of this kind has been productive of such cost and delay as in the end to ruin a vendor outright, instead of relieving him from some temporary embarrassment which was his sole inducement for disposing of his property.

Vendor bound by his

A vendor who is unacquainted with the true state of his title may possibly, by the simple act

agreement to furnish every information respecting the property.

of signing a general agreement to sell, bind himself to furnish information respecting his property which, if done, will not only effectually deter any one from completing the purchase, but may expose the owner of it to eviction, or at any rate to litigation, by exposing the weakness of his estate; which may, and, indeed, often has been communicated to persons having claims upon the property: (See 8 Ves. 141.) Now had the title been previously investigated, and had it been discovered that the defects were incurable, and at the same time of such a dangerous nature that their disclosure would tend to the mischievous results above alluded to, how much more prudent a course would it have been to have avoided incurring so great a risk by thus placing the property in the market, where, after all, there was so little prospect of its being sold. And even where a title is quite safe, it will often be advisable for a vendor to protect himself against unnecessary delay—for few men sell their estates who are not in want of the purchase-money—as well as from unnecessary expenditure, arising from objections or requisitions, often frivolously, and sometimes even vexatiously made. It sometimes happens that some of the earlier instruments of title, or some recited deeds or other documents relating to the property, may be lost, or the vendor may be unable to obtain their production; or they can only be procured at a vast expense in proportion to the amount of the purchase-money. Some minor points may also arise, which, though scarcely possible to prejudice a purchaser, he might, if he pleases, insist upon having cleared up, and so entail very heavy costs upon the vendor. This, in sales of small properties, has in some instances exceeded the actual amount of the purchase-money, and may, indeed, occur in the sale of estates of considerable value, when sold in small lots and the title-deeds are numerous; for each

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*Preliminary proceedings.*

lot forming a distinct subject-matter of sale, each purchaser is entitled to have attested copies of all the title-deeds necessary to establish his title, where they are not delivered over to him at the time of completing the purchase; and all these, in the absence of an express stipulation to the contrary, must be furnished by the vendor at his own expense. An instance once occurred (*Bird* v. *Le Fevre*, 6 Ves. 460, n. (a); see also *Berry* v. *Young*, 2 Esp. N. P. C. 640 (n.); *Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 *ibid.* 176; *Barclay* v. *Raine*, 1 Sim. & Stu. 449) where, in the absence of a provision of this kind, an estate having been sold in 200 lots, it cost the vendor 2,000*l.* to furnish the various purchasers with the attested copies which they insisted, as they had clearly a right to do, upon being supplied with.

Advantages of carefully penned conditions of sale.

Now most, if not every one, of the evils resulting from the above causes, might have been avoided by well-penned conditions of sale, which, without the slightest injustice to the purchaser, would have protected the vendor from all the difficulties in which the particular circumstances of his title would otherwise have placed him.

Vendor's actual interest in the property should be ascertained.

The vendor's solicitor should also take especial care to ascertain the actual estate or interest his client takes in the property, as also the nature and tenure of the property itself, and all its incidents and liabilities. If the vendor takes but a limited interest, as for years, or for his own life, or his estate is determinable on the lives of others, his solicitor should strive to ascertain how that interest may be disposed of to the greatest possible advantage. If the estate be determinable upon lives, he should ascertain whether any of the lives are insured, and if so, whether any of the policies are in the possession or under the control of the vendor, and whether in the latter case the policy might not be advan-

tageously disposed of with the property. Whether, in case none of the lives are insured, it might not be advisable to do so before offering the property for sale; and, if so, then which of the lives it would be most eligible to select; and here it may be proper to remark that there are some insurance offices which, under certain restrictions, will undertake to insure even unhealthy lives.

Where vendor takes a limited interest only.

Another important subject of inquiry, where a vendor takes a limited interest, is, whether that interest might not be more advantageously disposed of if the concurrence of other parties, also interested, could be obtained; as the concurrence of the reversioner where the party wishing to sell is only tenant for life; or *vice versâ*, the concurrence of the tenant for life, where the intended vendor is only entitled to the reversion expectant on the determination of such prior life estate.

As to outstanding estates in third persons.

Where there are any outstanding estates in third persons, who take no beneficial interest in the premises: as where a mortgage has been paid off, but there has been no reconveyance of the mortgaged premises, it will frequently be advisable to get all these conveyed, either to the vendor himself, or to a trustee for him, prior to offering the property for sale. It has often happened that persons would readily concur in an assurance for the purpose of simply strengthening the owner's title to his possessions, yet when they find the property is in the market, and suppose their conveyance essential to complete the sale, will give a great deal of trouble, and make very exorbitant demands, which they would never have dreamt of doing if they had not supposed the vendor wanted to sell the property. It is true a court of equity would in most instances compel parties of this kind to concur,

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*Preliminary proceedings.*

but still the necessity of adopting such a course should if possible be avoided.

Sometimes necessary to ascertain whether a sale by private contract will be more eligible than an auction.

Another important question often arises, which renders it especially necessary for a solicitor to be acquainted with the true state of his client's title; and that is, whether such title may not be so circumstanced as to render a sale by private contract a more eligible mode of proceeding than a public auction.

Special stipulations where advisable.

A title may be, and indeed often is, so situated as to render it prudent for a vendor to insert such special stipulations in his contract, which, though open to little or little or no objection when privately discussed, would, if submitted without comment to the public in the ordinary conditions attendant on an auction, tend very considerably to damp the sale, and perhaps even have the effect of deterring parties from bidding for the property at all. It often happens that there are some dormant claims upon the estate, which, though not likely to be made, are yet a fatal objection to the title. Rights may also have been reserved by former grantors which have never been exercised, and, in all human probability, never will, as a right of digging and searching for minerals in a district unadapted for mining purposes. An inability to complete the title until a future period, on account of some of the conveying parties being under age, not unfrequently occurs. It sometimes also happens that a person having a claim upon the property, and whose interest determines with his life or failure of issue, is dead, and, there is every reason to believe, without leaving issue, but there is no conclusive evidence to prove either of those facts. It may also happen, that some of the earlier title-deeds are lost, or the vendor is unable to produce them, or he has a mere possessory title, without any evidence whatever to show its

commencement, in which case even a peaceable and uninterrupted possession of sixty years will not confer a good title, unless its origin can be shown; nor has the recent Statute of Limitations (stat. 3 & 4 Will. 4, c. 27) made any alteration in the law in this respect. (*Cooper* v. *Emery*, Phill. 388; *Hodgkinson* v. *Cooper*, 6 L. T. 451.)

Now all these impediments above enumerated, though forming a serious objection to a title, may yet in a great measure be obviated by a private arrangement between the parties. A purchaser may be satisfied, after a fair discussion upon the subject, that the dormant claims can never possibly be asserted; that no exercise of the reserved rights will ever be attempted, the effect of which would be to incur a considerable amount of expense, without the possibility of any benefit being derived from it. When any of the necessary conveying parties are under age, some arrangement may generally be entered into, where the parties are ready and willing so to do, by which the purchaser may be allowed to retain a proportionate part of the purchase-money until the title is perfected by the concurrence of the minors. And in all the other instances where the vendor is in affluent circumstances, and has no objection to give the purchaser a sufficient indemnity, the matter may generally be arranged to the mutual satisfaction of all parties.

### 3. *Advertising the Property.*

Particulars for preparing advertisements

If the lands which are the subject-matter of sale are designed to be sold by public auction, the advertisement should state the day; the time and place of sale; the name of the auctioneer, and the name and place of abode of the vendor's agent or solicitor. It should also contain a general description of the property, number of lots, quantity of acres, and the particular kind of tenure under which it is holden. Should the

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estate, as often happens, be sold by private contract before the arrival of the day when the sale is advertised to take place, or should any other events arise to prevent the sale from taking place at the appointed time, early notice to that effect should be given, and should be circulated in such way as to obtain equal publicity as the previous advertisements; in order that parties may not be put to the trouble and expense of attending the proposed place of sale, when no actual sale is intended to take place there.

When the sale is made under a decree.

When a sale is to be made under a decree of a court of equity, the practice is for the particulars of sale to be prepared and approved of by the master previously to the advertisement of the property, and his signature must be procured before this can be done. In sales of this kind there are always two advertisements. In the first, no time of sale is appointed; but in the second (termed the preremptory advertisement), which is usually inserted about three weeks afterwards, the time and place of sale is fixed upon, and copies of this advertisement are put into other newspapers: usually in one or two well-circulated London papers, and such provincial ones as are in the most general circulation in the neighbourhood of the property. (Smith, Pract. 172, 2nd edit.; 1 Turn. Pract. 127.)

### 4. *Practical Directions for framing the Particulars and Conditions of Sale.*

1. *As to the particulars relating to the subject-matter of sale.*
2. *The conditions subject to which the property is to be sold.*

Practical directions for preparing particulars of sale.

1. *As to the particulars relating to the subject-matter of sale.*—The preparation of the particulars and conditions of sale will require considerable attention; and the mode in which these

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estate is sold in lots. Sometimes, however, where the estate is sold as an entirety, and not in lots, the practice has been to give a mere general description, to the following effect:—

Conditions of an auction held at the White Hart Inn, in the town of Okehampton, in the county of Devon, by Mr. P——, a licensed auctioneer, on the day of , for selling, on behalf of A. B., Esq., the fee simple and inheritance in possession of all that capital barton, messuage, and farm called E——, situate, lying, and being in the parish of L——, in the said county of Devon, containing, by admeasurement, 250a. 2r. 3p. statute measure, or thereabouts.

Where the estate is sold in lots, a form of particulars corresponding with the following will be found well adapted to the purpose:—

No. 1.

| Lots. | Tenements. | Quantities in statute measure. | | |
|---|---|---|---|---|
| | | A. | R. | P. |
| 1 | Home tenement, otherwise Grandison's close | 23 | 2 | 39 |
| 2 | Grandison Wood | 28 | 2 | 20 |
| 3 | Tenement in Week, and common | 10 | 0 | 39 |
| 4 | Smith's close | 16 | 1 | 30 |
| 5 | Tenement (Roger's), and water grist mills | 5 | 2 | 1 |

And so on, describing the different lots according to their respective descriptions.

Where the sale is of a leasehold property determinable on lives, the age of the lives should be set out in the particulars, as follows:—

| Lots. | Particulars. | Age of Lives in the year 1845. | | | Quantities in statute measure. | | |
|---|---|---|---|---|---|---|---|
| | | | | | A. | R. | P. |
| 6 | Crosse's tenement | 26 | 24 | 54 | 12 | 0 | 4 |
| 7 | South Close | 46 | 21 | — | 24 | 2 | 28 |
| 8 | Eworthy Coppice and Daw's Wood | 71 | 69 | 60 | 25 | 2 | 14 |
| 9 | Two cottages and gardens in Eworthy | 40 | 35 | — | 1 | 1 | 25 |

How particulars should be made when premises are sold on behalf of different parties.

It sometimes happens that where an estate is sold in lots, some of such lots are sold on behalf of different parties, as where a person mortgages different portions of his property to distinct parties who all concur in the sale, under a power or trust for sale contained in the respective deeds under which they claim; in which case the name of the party in whose behalf such portion of the property is sold may be set out at the end of the description of such property in the following terms, viz:—

These lots are sold for and on behalf of John Smith, of, &c., gentleman, under the several trusts and powers of sale contained in certain indentures of mortgage, bearing date respectively the and days of 1841.

Term for which premises are holden should be stated.

Where the property is leasehold, the term for which the premises are holden, the amount of the outgoings, and the duration of the vendor's interest, should be accurately set forth, as a wilful misdescription in either of these matters might vitiate the sale. (*Farrer* v. *Nightingale*, 2 Esp. N. P. C. 639; *Duke of Norfolk* v. *Worthy*, 1 Camp. N. P. C. 337; *Pasley* v. *Freeman*, 5 T. R. 21; *Stewart* v. *Alliston*, 1 Mer. 26; *Waring* v. *Hoggart*, 1 Ry. & M. 39; *Flight* v. *Booth*, 1 Bing. N. C. 370; *Ballard* v. *Way*, 1 Mees. & Wels. 520.) Thus in the case in *Jones* v. *Edney* (3 Camp. N. P. C. 337), where in the particulars of sale of a leasehold house it was stated to be "*a free public-house*," when in point of fact the lease contained an express covenant to take beer from the lessor, upon which ground the purchaser refused to complete the contract, and, having brought his action, recovered back the amount of the deposit-money he had previously paid. And wherever the covenants of a lease are set out care should be taken to state them exactly according to the facts.

Covenants in a lease should be set out.

"Common and usual covenants" in a lease of a public-house, have been construed to include covenants to pay land tax, sewer's rate, and other taxes, and a proviso for re-entry, if any business but that of a victualler should be carried on in the house: (*Bennet* v. *Womack*, 7 B. & C. 627, S. C.; 1 Mann. & Ry. 644.)

As to copyholds.

In the case of copyholds, also, the nature of the tenure and the terms upon which they are holden should also be set forth.

Estates determinable on lives.

Where the estate is determinable on lives, whether it be leasehold or copyhold, should any of the lives drop before the sale, the particulars should be altered so as to correspond with that circumstance; as a parol statement of that fact by the auctioneer, although publicly made at the time of sale, will be insufficient; upon the long-established principle (*Powell* v. *Edmunds*, 12 East, 6; *Jones* v. *Edney*, 3 Camp. 9 P. C. 285; *Jenkinson* v. *Pepys*, 6 Ves. 330: *Parteriche* v. *Powlett*, 2 Atk. 384; 29 Car. 2, c. 3, s. 4), that written statements cannot be varied by word of mouth; and a purchaser in such case would be allowed to rescind the contract on account of the duration of the vendor's estate in the premises having been so misrepresented in the particulars of sale: (*Bradshaw* v. *Bennett*, 5 C. & P. 48.)

Property should be correctly described.

In no case whatever should the property, of what nature or tenure soever it may chance to be, be exaggerated in extent, or in any case be wilfully misdescribed; for if this be proved, a purchaser cannot be compelled to complete the sale even with a compensation; as where an estate was stated to be but one mile from a borough town, from which it turned out to be three or four miles distant: (*Duke of Norfolk* v. *Worth*, 1 Camp. N. P. C. 337.) So if a vendor were to profess to sell an estate with the right of shooting over it, which right he did not possess, and consequently could not grant (*Stock*

v. *Rook*, 1 T. R. 337); or to sell an estate tithe-free, which, in point of fact, was not so (*Stewart* v. *Alliston*, 1 Mer. 26); or the particulars are silent as to the existence of a right of way over the property (*Dykes* v. *Blake*, 4 Bing. N.S. 463); the purchaser in either of such cases would be at liberty to vacate the sale, and could not be compelled to complete it upon being allowed a compensation for the decreased value. And where a composition is provided for by the express terms of the conditions, still, if no accurate estimate can be arrived at as to the amount of diminution in value, the purchaser will be at liberty to annul the contract: (*Sherwood* v. *Robins*, 5 Car. & Pay. 339.) The concealment of any easement or right in anywise affecting the property vested in these parties, will afford a purchaser sufficient grounds for rescinding the contract. Hence, where a vendor put up for sale by auction land described as eligible for building, and after a contract had been made the purchaser discovered that there existed rights in third parties to have water supplied to them through parts of the land, by means of an underground course, with liberty for such third parties to open, cleanse, and repair the watercourse, making satisfaction for damage done by them: it was held, that the vendor could not, under the circumstances, enforce the contract, and that existence of the easement was not a subject for compensation: (*Shackleton* v. *Sutcliffe*, V.-C. Bruce's Court, Nov. 5, 6, 8, and 18; 10 Law T. 411.) Yet, generally speaking, where there is a misdescription merely as to the quantity of acres, it is usually treated as a matter of compensation by a court of equity, the amount of which the purchaser will be allowed to deduct out of his purchase-money, and this without any necessity on his part of showing any fraudulent intent upon the part of the vendor. And notwithstanding it has

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been held that a purchaser will not be entitled to an abatement in price for a deficiency in quantity where the conditions describe the estate as containing so many acres, *be the same more or less* (*Winch* v. *Winchester*, 1 Ves. & Bea. 375); yet this rule will only hold where the vendor is himself ignorant of the true state of the facts; for if it could be shown that he was aware of what the exact quantity was, and described the property as containing more, the mere insertion of the words "*be the same more or less*" would not protect his fraudulent statement, and he would be compelled to allow a proportionate abatement in price to make up for the deficiency in quantity: (*Duke of Norfolk* v. *Worthy*, 1 Camp. N. P. C. 337.) Where any doubt exists as to the exact number of acres, and the vendor is unwilling to incur the expense of having the property surveyed, it is a common practice to insert in the conditions, "that the number of acres advertised as being according to admeasurement, are believed to be correct, but are not warranted to be so." But a clause of this kind would not protect a wilful and fraudulent misstatement where the vendor knew what the real extent actually was.

Measurement.

Before the statute of 5 Geo. 4, c. 2, where a person entered into a contract for the sale of any specified number of acres known by estimation of limits, such acres were to be taken according to the estimation of the country where the lands were situate, and not according to statute measure: (*Morgan* v. *Tedcastle*, Poph. 55; *Floyd* v. *Bethell*, 1 Rol. Rep. 520.) But the law is now altered in this respect by the enactment above referred to, which directs, that in all cases where any special agreement shall be made in respect of any measure established by local custom, the proportion which every such local measure shall bear to any of the said standard measures set forth by that act, shall be specified in the agree-

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ment, otherwise such agreement shall be null and void.

Where the property is intended to be sold subject to any incumbrances, the extent and nature of such incumbrances should be set forth in the conditions, particularly where the vendor cannot compel the parties to release their interests; in which case, in the absence of a provision of this kind, the incumbrances, as matters of title, and not simply of conveyance, may afford ground for rescinding the contract *in toto*. Mortgages and judgments are, however, considered as mere matters of conveyance (*Boothby* v. *Walker*, 1 Mad. Rep. 199; *Townsend* v. *Champernown*, 1 You. & Jerv. 449), and are therefore no fatal objection to the title; and annuities seem also at one time to have been viewed in the same light (*Berkley* v. *Dauh*, 16 Ves. 380); but it seems now to be determined that a charge of annuities affords a solid ground of objection to the title, as the lands onerated with them will continue so charged in the hands of a purchaser, the vendor having no right to compel them to release their interests; because it was the very purpose of making the land a fund for that payment that it should be a constant and subsisting fund (*Elliott* v. *Merryman*, Barnard. 82; *Wynn* v. *Williams*, 5 Ves. 130; *Page* v. *Adam*, 10 L. J. N. S. 407); consequently, unless the vendor can prevail upon the annuitants to release their interests, the purchaser may refuse to complete the purchase. Where, therefore, the property is designed to be sold subject to an annuity, it may be proper to state, of course varying the terms as the case may require—

As to annuities and other incumbrances.

Mortgages and judgments mere matter of conveyance, and not of title.

Annuities a fatal objection to a title.

Subject to an annuity or yearly rent-charge of 50*l.* payable quarterly, to A. B., for her life, out of the premises granted and created [*here insert the instrument by which this charge was made, its date, names of parties, &c.*]; which said annuity, from

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the day of , now next, is to be discharged by the purchaser.

Effect of charge of debts upon real property

It may be proper, however, to remark that if a testator devises all his estate, real and personal, to C. absolutely, subject to the payment of *debts*, legacies, and *annuities*, and C. afterwards contracts to sell the devised lands, he may, in such case, *the debts being charged upon the whole estate*, make a good title to a purchaser without the concurrence of the annuitants (*Page* v. *Adam*, Rolls, July 30, 1841, 10 L. J. N. S. 107); for where lands are devised charged with the payment of debts, the devisee may always sell in order to pay them; and unless the particular debts are specified, the purchaser is, from necessity and general convenience, exempted from the obligation of seeing to the application of the purchase-money: (3 Prest. Abs. 360.)

How conditions should be penned when property is to be sold subject to existing mortgages.

Where the estate is intended to be sold subject to a mortgage, the following clause may be annexed to the conditions :—

Subject to a mortgage in fee of the said premises created by indentures of lease and release, bearing date respectively the and days of 18 [*if the mortgage be for years, then state* "by indenture of demise, bearing date, &c."], and made between [*here name the parties*], for securing the sum of 1,500*l.* and interest at 4*l.* per cent. which said sum of 1,500*l.* and interest thereon from the day of now next, is to be discharged by the purchaser.

Leases.

When the estate is to be sold subject to leases, insert—

Other than and except such leases not exceeding years, or any lesser time, as the vendor hath already granted of the said premises or any part thereof, at the full improved rents reserved in such leases respectively.

Notice of lease construed as notice of tenancy.

In all cases, indeed, in which there is an existing tenancy, it should be inserted in the particulars of sale. Added to this, the purchaser

ought, for his own security, to make himself acquainted with the nature of such tenancy; notice of a term being considered to afford notice of the terms of such tenancy: (*Daniels* v. *Davison*, 16 Ves. 249.)

Reversions.

When the subject-matter of sale is a reversion in fee expectant on long leases determinable on lives, the following form descriptive of the property may be found useful:—

The reversion in fee expectant on the determination of the several leasehold estates therein respectively, being terms for 99 years determinable respectively on the deaths of lives aged as undermentioned, of and in the following messuages or tenements, situate in and being parcel or held of the manor or reputed manor of W., otherwise Great W., in the said county of Devon: *videlicet.* [*Here set out the particular number of lots, ages of lives, and quantities in statute measure, as in schedule No.* 2, *sup.*]

Quit Rent.

If the premises are liable to a quit rent, insert—

The said premises or some part of the same are subject to a quit rent of 16*s.* 4*d.* payable to Sir W. M., Bart., and the said premises are to be sold subject thereto.

Value should be correctly stated.

A vendor should be also careful to make no misstatement as to the value of the property; for though a simple statement to that effect will not entitle a purchaser to relief, because it was simply his own folly to credit a bare assertion so commonly made by sellers to enhance the price, still, if the vendor (*Harvey* v. *Young*, Yelv. 20,) were to state that it had been valued by competent persons at a higher sum than it actually was, and a purchaser were deceived by such misrepresentation, a court of equity would relieve him from a specific performance; and it also seems that the vendor would be precluded from recovering at law for the nonperformance of such agreement (*Buxton* v. *Cooper*, 3 Atk. 383.)

Amount of rent should never be exaggerated.

Nor should the amount of rent the property yields ever be exaggerated, as this would not only afford sufficient ground for the purchaser's re-

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scinding the contract in equity (*Buxton* v. *Cooper*, 3 Atk. 383; *Partridge* v. *Usborn*, 5 Russ. 195; *Small* v. *Atwood*, ib. 107), as well as for debarring the vendor from maintaining an action at law against the purchaser for not completing the sale (*Dobell* v. *Hutchinson*, 3 Ad. & El. 355; *Leach* v. *Mullett*, 3 Car. & Pay. 115; *Flight* v. *Booth*, 1 Bing. N. P. C., N. S. 370), but would also render the misrepresenting party liable to an action for the deceit (*Ekins* v. *Thresham*, 1 Lev. 102; *Risney* v. *Selby*, 1 Salk. 211; *Dobell* v. *Stephens*, 3 B. & C. 623), whether it should appear that he made such a misrepresentation with a view of deceiving a purchaser, or in favour of the vendor, or from the hope of any personal advantage to himself, or from ill-will, or from mere wantonness. (*Pasley* v. *Freeman*, 3 T. R. 51; *Eyre* v. *Dunsford*, 1 East, 318; *Haycraft* v. *Creasy*, 2 East, 92, cited also 3 Bos & Pull. 397; *Hutchinson* v. *Bell*, 1 Taunt. 558; *De Graves* v. *Smith*, 2 Camp. N. P. C. 533; *Foster* v. *Charles*, 6 Bing. 396, 7 Bing. 105; *Corbet* v. *Brown*, 2 Mood. & Malk. 108; *Freeman* v. *Baker*, 5 B. & Ad. 797; see also *Burrowes* v. *Lock*, 10 Ves. 470; Selw. N. P. 662, 9th edit.) Yet it seems that no action will lie against a vendor, or any one else, for stating that a particular person offered a certain sum for the estate, although the purchaser might be misled thereby as to the true value, and the statement itself should prove wholly devoid of foundation: (1 Roll. Abr. 101, pl. 16; *Brown* v. *Fenton*, 14 Ves. 144; *Trower* v. *Newcombe*, 3 Mer. 704; *Scott* v. *Hanson*, 1 Sim. 13.) If the interest is sold subject to any legacy duty or any other deduction, those facts should be stated in the particulars of sale: (*Dyke* v. *Blake*, 4 Bing. N. C. 463, 467; see also *Dawes* v. *King*, 1 Stark. 5.)

*Misrepresentation will render party liable to an action.*

*How premises of different tenures should be distinguished.*

Where lands of different tenure are sold together as an entire estate, or are included in the same lot, care should be taken to distinguish

them, and the estate or interest of the vendor should be accurately set forth. An error in this respect would be sufficient to vitiate the contract at law (*Farrer* v. *Nightingale*, 2 Esp. N. P. C. 639), although in equity, provided the purchaser thinks proper to take such an interest as the vendor really has, the agreement will generally be supported, where sufficient compensation can be made: (*Milligan* v. *Cooke*, 16 Ves. 1; *Seaman* v. *Vawdrey*, ib. 290; *Halsey* v. *Grant*, 13 ib. 37; *Hill* v. *Buckley*, 17 ib. 401; *Grant* v. *Munt*, Coop. 173; see also *Mortlock* v. *Butler*, 10 Ves. 316.) Hence, if a vendor were to sign an agreement for the sale of an estate in fee-simple, when in truth he has only a term of years in the property; or were even to state the property to be held by tenants under written agreements, and the holdings should turn out to be by parol only (*Bessonet* v. *Robins*, 1 Sans. & Scul. 142; *Wood* v. *Griffith*, 1 Wils. 44; 1 Mad. Pract. 431, 2nd edit.; *Attorney-General* v. *Gower*, 1 Ves. sen. 218; *Barker* v. *Damer*, D. P. 17 April, 1741, cited 1 Mad. Pract. 431, 2nd edit.); or the land should turn out to be copyhold or customary tenure (*Twining* v. *Morrice*, 2 Bro. C. C. 326; see also *Hick* v. *Philips*, Prec. Cha. 575); or the vendor should only have (*Mason* v. *Corder*, 2 Marsh. 332) an undivided part where he contracted to sell the whole (*Roffey* v. *Shallcross*, 4 Mad. Rep. 227; *Dalby* v. *Pullen*, 2 Sim. 29; *Casamajor* v. *Strode*, 3 Myl. & Kee. 726); or an under-lease where he contracted to sell a lease, the purchaser may, if he pleases, compel a conveyance or assignment of the interest the vendor really possesses, and insist upon having a proportionate sum by way of abatement allowed out of the purchase-money, to make up the difference in value between the interest contracted for and that which the vendor really had in the premises. This the vendor cannot avoid

Purchaser entitled to rescind contract when vendor has not the interest he pretended to sell.

complying with, however he himself may have been deceived as to the true nature of the property he proposed selling. Still, he might have effectually guarded against these consequences by stipulating,

As to stipulation for annulling contract.

That if, upon examination of the title, it should appear that the vendor is unable to make a good title to the freehold, that the vendor shall be at liberty to annul the sale on returning to the purchaser his deposit without interest; and the vendor shall not be compelled to convey or assign any lesser estate he may chance to have in the premises.

How the clause for annulling contract should be framed.

If it is intended that the contract shall not be annulled in case it should turn out that the vendor has a lesser estate than the fee, it should be provided,

That if it shall appear that the said premises, of any of them, are not of freehold tenure, or the lessor should not be entitled to the whole estate in the premises, the contract shall not on that account be annulled; but in such case the purchaser shall accept a proportionate abatement out of the purchase-money; and in case of any disagreement as to the amount, the value shall be fixed by two persons, one to be chosen by the vendor, and the other by the purchaser, who, if they cannot agree, shall call in an umpire, whose decision shall be final between the parties.

As to proviso for referring to arbitration.

It will also be advisable to extend this provision still further, by adding, that,

Provided also, that if either party shall refuse to appoint a referee, then the referee of the other party may act alone, and his award shall be binding and conclusive between the parties.

As to reservations of mines.

Where an estate is subject to a right of entry for the purpose of searching for minerals, it has been holden to be a subject for compensation (*Seaman* v. *Vawdrey*, 16 Ves. 323), which the vendor could not get clear of by offering to waive the contract and place the vendee in the same situation he would have been in if no such

contract had ever been entered into. But where a right has been reserved, which for a long period of years has never been acted upon, and from the very terms of its reservation can never be exercised, a court of equity has gone so far as to decree a specific performance, even without a compensation; as in the case of *Lyddall* v. *Weston* (2 Atk. 19), where, upon a purchase, it appeared that the estate had been originally granted by the crown, in which grant there was a reservation of tin, lead, and all *royal mines*, but *without a right of entry;* and it appearing that there had been no search for royal mines for one hundred and eleven years, and upon examination the probability was great that there were no such mines, and the crown, for *want of a right of entry*, being unable to grant a licence to any one to enter and work them, Lord Hardwicke decreed a specific performance. The correctness of this decision is very questionable, and it is doubtful if it would be followed at the present day. A reservation of this kind, although it may never be or even cannot possibly be exercised by the party reserving the right, is yet sufficient to prevent the purchaser from so doing, and thus he is debarred from exercising one of the privileges every purchaser of an estate in fee-simple in real property is entitled to. The inference as to the probability of there being or not being mines under the *locus in quo*, or its being adapted to mining purposes is entitled to little or no weight; for many valuable mines have sprung and are constantly being discovered in districts in which no one at the time that *Lyddall* v. *Weston* was decided, would ever have dreamt of finding anything of the kind. In *Lyddall* v. *Weston*, therefore, the purchaser clearly had not the entire interest he contracted for, and he was undoubtedly, in consistence with every principle of justice and equity, entitled to compensation.

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Whether purchaser of several lots will be compelled to complete purchase as to part where no title can be made to the residue.

Where an estate is sold in lots, and no title can be made to a lot complicated with the rest or essentially necessary for its enjoyment, the purchaser will not be compelled to take the remaining lots to which a marketable title can be made. As, for example, if the contract were for a house and a wharf, the wharf being the chief inducement for the purchase, a purchaser ought not to be compelled to take the house only: (*Stapleton* v. *Scott*, 13 Ves. 427; *Knatchbull* v. *Gruebar*, 1 Mad. Rep. 153). So if a purchase were made of a mansion-house in one lot, and farms, &c., in other lots, and no title could be made to the mansion, the purchaser ought not to be compelled to take the farms, with a simple compensation for the loss of the mansion, the purchase of which might have been his sole motive for entering into the contract. But it seems that where a pew in a parish church is contracted to be sold with a messuage, to which it is stated to be appurtenant, a defect in the title to the pew will not be considered as a ground for rescinding the purchase as to the house; the possession of the pew not being considered so essential to the enjoyment of the rest of the property, but that it might be made a matter for compensation. It will be proper also to remark, that where an estate is sold in lots, some express provision will generally be necessary respecting the grants and reservations of rights of way necessary to the occupation and enjoyment of the different allotments. It is impossible to lay down any precise rules, or to attempt to supply forms upon a matter which must ever be subject to such a variety of circumstances; at the same time the greatest precautions will often be necessary to prevent future disputes between the respective purchasers, whilst at the same time it should ever be borne in mind that there are few more fruitful sources of liti-

gation than a disputed right of way: (*Chambers* v. *Griffith*, 1 Esp. N. P. C. 150; *Gibson* v. *Spurrier*, Peake, Add. Cas. 49; *Dykes* v. *Blake*, 4 Bing. N. C. 463.)

Existence of right of way, as to which the conditions are silent, will afford ground for rescinding contract.

Certain it is, however, that where a right of way exists over a lot respecting which the conditions are silent, the usual condition as to misdescription, and providing for a compensation, will not prevent a purchaser from annulling the sale. Indeed, with such a right existing, the property may oftentimes be useless for the very purpose for which alone it was purchased. In *Dykes* v. *Blake*, 4 Bing. N. C. 476, by particulars of sale, lot 13 was described as building-ground, and adjoining the lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7 referred to a lease, which gave to the occupier of that and several adjoining lots composing a row of houses, a carriage-way in common, in front of the lots, and a footway at the back, and also a footway over lot 14. The particulars contained plans which disclosed the carriage-way in front, and the footway at the back of the house, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. Plaintiff having purchased lots 12 and 13 by one contract, in ignorance of the footway over lot 13, it was held that the misdescription was such as to entitle him to rescind the contract as to both.

Mixed freehold and copyhold:

Sometimes the subject-matter of sale consists of freehold and copyhold or customary lands, lying intermixed with each other. Whenever this occurs, for the reasons already stated, it will be advisable to stipulate,

That if any mistake in the relative proportions of the freehold or copyhold or customary lands, or any other mistake or

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error shall appear in the particulars, such mistake or error shall not annul the sale, but a compensation shall be made or taken, as the case may require, to be fixed by two referees (*ut sup*).

Leaseholds, nature of vendor's interest in, should be correctly stated.

In the sale of leasehold property it not unfrequently happens that, although the nature of the vendor's estate in the premises is correctly stated, yet the term of it has been exaggerated in point of duration; but in such cases if the deficiency is not very great, a Court of Equity will generally support the contract, deducting a proportionate part of the purchase-money, although, at law, such a misrepresentation would have afforded a sufficient ground for vacating the sale altogether: (*Guest* v. *Homfray*, 5 Ves. 818; *Hanger* v. *Eyles*, 21 Vin. Abr. A. pl. 1.) And if the number of years is considerably less than what the vendor agreed to sell,—as, for example, where the term is stated to be sixteen years, when, in fact, it turns out to be only six,—such an agreement would not be enforced, even in equity (*Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5); and that court, so far from interfering in favour of the vendor in so flagrant a case of misrepresentation, would make him pay all the costs, and assist the purchaser in recovering any deposit he may have paid (*ibid*). At the same time, agreements of this kind ought to receive a reasonable construction, for the parties cannot be supposed to intend that there shall be the exact term, neither more nor less by a single day; and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, including, therefore, the current half-year: (*Belworth* v. *Hassell*, 4 Camp. N. P. C. 140.)

Fraudulent concealment will vitiate sale.

No unfair attempt should be made to conceal defects, particularly where they are of such a latent nature as a purchaser cannot, by ordinary attention, discover (*Mellish* v. *Motteux*, Peake,

N. P. C. 115), yet a purchaser will not be entitled to any protective favour, unless he uses ordinary precaution. If, therefore, a house were to be warranted in thorough repair, and its ruinous state was obvious to the most casual observer, the vendor would not be bound by the warranty (*Pickering* v. *Dowson*, 4 Taunt. 779; *Marketson* v. *Wright*, 7 Bing. 605); but if he were to strive to conceal the injury, as by hiding a defect in the building by plaster, or by papering it over (4 Taunt. 785), so that a person examining the premises cannot possibly detect it, or by any other plan or contrivance manage to conceal defects within his own knowledge, and which, if discovered, could not fail to deteriorate materially from the value of the property, the vendor will in such case be bound by his warranty. Misrepresentations of this kind being founded upon fraud, may be made the foundation of an action at law in the nature of deceit, the *gist* of which is the fraudulent knowledge of the party, technically termed the *scienter*, and this must be averred in the declaration and also proved in evidence at the trial: (*Dale's case*, Cro. Eliz. 44; *Chandelor* v. *Lopus*, Cro. Jac. 4; *Springwell* v. *Allen*, Aleyne, 91. See also Selw. N. P. 648, 9th edit.) It must also be kept in view that mere trifling defects, such as a few broken panes of glass, or even a few rotten boards in the flooring of a house, will not afford sufficient ground for an action of this kind, in which fraud and falsehood must both concur to sustain: (*Ashlin* v. *White*, Holt, N. P. C. 387.) And as on the one hand, a fraudulent concealment of defects may entitle a purchaser to rescind the contract, so on the other hand, although a purchaser is not bound to acquaint a vendor with any latent advantage in the estate, yet any concealment on his part for the purpose of obtaining an estate at a grossly inadequate price may be

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deemed fraudulent: (*Deane* v. *Rastron*, 1 Anstr. 64; *Turner* v. *Harvey*, Jac. 169; *Brealey* v. *Collins*, You. 317; Bainb. 419.)

No misstatement should be made as to repairs, &c.

There are some other instances also in which vendors ought to be exceedingly careful about making false statements as to the state of repairs; amongst which may be mentioned the condition of sea-walls or other embankments to protect the land from inundations, as casual observers would in most cases be unable to form any accurate judgment upon a matter of this kind. The same observations are also applicable to meadow land warranted to be richly watered; which, though abundantly supplied at some particular times and seasons, may altogether fail during the summer months, when its services would be most required; or the water may be of a bad quality, and wholly unfit for the purposes of irrigation. The failure of water at certain periods of the year will also apply to mills warranted to have a never-failing supply. Defects like these may be well known to the vendor, and yet it is only at certain times and seasons a purchaser, particularly if residing at a distance, can have an opportunity of discovering them.

Practical instructions for preparing the conditions.

Having said thus much upon the particulars, our next attempt relative to the subject-matter of sale, will be to point out the best mode of preparing the conditions upon which such property is to be sold.

Usual clauses in conditions of sale.

The clauses usually inserted in conditions of sale are as follow:—

1. That the respective lots shall be put up at such prices as shall be named by the auctioneer.

Where the property is sold entire.

In case the property is sold entire, and not in lots, the above clause is omitted, and the conditions commence with the clause following, which is a usual one in both cases.

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2. That the highest bidder shall be the purchaser (subject to the right of the vendor or his solicitor to bid once); and if any dispute shall arise as to the last or highest bidding for any lot, the lot with respect to which such dispute shall arise shall be put up again at the last preceding undisputed bidding.

Highest bidder to be the purchaser.

3. That no person shall advance a less sum at each bidding than shall be named by the auctioneer at the time of putting up each lot, or retract his or her bidding.

No person to bid less than a certain sum.

The clause as to the payment of the auction duty was usually inserted next, to which it was often superadded that the purchaser should pay a certain sum to the auctioneer for his trouble. But auction duties being now repealed by the 8 Vict. c. 15, s. 1, the former part of the clause is unnecessary; and when it is designed that the purchaser shall pay the auctioneer for his attendance, it will be sufficient to state,

Payment of auctioneer.

Auction duties now repealed.

4. That the purchaser of each lot shall immediately after such sale, pay down to the auctioneer the sum of £ for his trouble in selling the premises.

Purchaser to pay auctioneer for his trouble in selling premises.

Next comes the clause as to the payment of the deposit, which usually stipulates,

Deposit.

5. That the respective purchasers shall immediately after the sale pay into the hands of (*the auctioneer or the vendor's agent*) a deposit of £ for every 100*l.* of his or her purchase-money in part payment of such purchase-money, and sign an agreement for completing the purchase, and for payment of the remainder of such money to the vendor, or such persons as he shall appoint (*at a time and place there set forth*), at which time and place the purchases are to be completed; and the respective purchasers are from thenceforth to be entitled to the rents and profits of the said premises. And all out-goings to that time to be cleared by the vendor.

Purchasers to pay down deposit at the time of signing contract.

To this clause is often superadded a provision, that in case the sale should not be completed at the appointed time, the purchaser shall pay interest. It usually runs thus:—

Proviso for payment of interest.

But if the completion of the purchase shall be delayed by any cause whatsoever beyond the said (*appointed time*), the respec-

That if purchase shall be delayed,

tive purchasers in respect of whose lots any such delay shall occur, shall pay interest at the rate of £ for every 100*l.* by the year from that day, without prejudice, however, to the right reserved to the vendor by the last condition.

purchaser shall pay interest.

To this clause is often superadded a further proviso in the following terms:—

Proviso that payment of interest shall not confer right of entry until completion of purchase.

Provided, that this clause shall not give to any purchaser any right of entry on any lot or lots until actual payment of his purchase-money.

Next comes the clause as to the title, which states,

Clause for production of title.

That vendor will deliver abstracts, &c.

6. That the vendor shall, at his own expense, within one calendar month from the day of sale, deliver abstracts of title to the respective purchasers, or their solicitors, and deduce a good title thereto, subject to the conditions. And each of the purchasers shall, within (*some specified time*) next after the delivery of such abstract, signify in writing to the vendor's solicitor his or her objection to, or requisitions on the title, as deduced by such abstract, and that, in default of his or her so doing, he or she shall be considered as having accepted the title unconditionally; and every objection or requisition not taken or made and so communicated in writing within such period, shall be considered as waived; and, in this respect, that time shall be considered part of the essence of the contract.

Clause enabling vendor to rescind contract if purchaser objects to title.

In case the vendor has the slightest ground for apprehending he may be unable to confer a good title, the following clause should be next inserted:—

If purchaser objects to title, vendor to be at liberty to rescind contract.

7. That in case the purchaser or purchasers, or their, his, or her solicitor, shall object to the title in manner above provided, the vendor shall be at liberty, if he shall think fit, by notice in writing under his hand, to vacate the sale, and thereupon such sale shall be absolutely null and void to all intents and purposes whatsoever; and the purchaser or purchasers shall be repaid his, her, or their deposit-money, but without interest, and all reasonable expenses sustained by him, her, or them, in respect of such sale; and each contracting party shall be placed in the same situation as if no agreement had ever been made; unless the purchaser or purchasers shall, within fourteen days

next after the receipt of such notice from the vendor of his intention to annul the sale, agree to accept the title unconditionally; and such right of the vendor to annul the sale, as aforesaid, shall not be considered as waived, or in any manner affected by any negotiation as to such objection, or requisition, or attempt or endeavour to obviate such objection, or to comply with such requisition, or to remedy any defect that may be objected to.

As to stipulations for title by vendor.

It is often advantageous to state at what time the title shall commence, and to provide at the same time that the purchaser shall not be entitled to make any objections to the earlier title, and also that the vendor shall not be responsible for any defects in the earlier title which may be discovered, although such earlier title may be recited or mentioned in any subsequent deed or instrument; for without a stipulation to this effect, it seems that a condition restraining a purchaser from requiring the production of the title anterior to a certain period or event does not preclude him from seeking out *aliundi*, and showing an actual defect in such anterior title: (*Shepherd* v. *Keatley*, 1 C. M. & R. 117; 4 Tyrwh. 571; *Edward* v. *Leay*, Coop. 308; *Hyde* v. *Dallaway*, 1 Beav. 606; *Flower* v. *Hartop*, 7 Jur. 613; *Dick* v. *Donald*, 1 Bligh, 655; *Southby* v. *Hutt*, 2 Myl. & Cr. 207; *Sellick* v. *Trevor*, 11 Mees. & Wels. 724.) And it is doubtful if the clause above suggested will protect a vendor who is aware of the defect, and yet withholds the disclosure of it. The only way it seems by which he can get over this difficulty, would be, an express statement of the defect, and that if the purchaser is to buy subject to it. (Bateman on Auctions, 81.)

Expenses relating to title.

A clause should be next inserted stating by whom the expense of barring estates tail, and other incidental expenses necessary to the establishment of the title, are to be borne. Most if not the whole of these expenses must, in the absence of an express stipulation to that effect,

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be defrayed by the vendor (*Boughton* v. *Jewell*, 15 Ves. 176; *Hughes* v. *Wynne*, 8 Sim. 85); as also all costs incurred in deducing evidence of descents, births marriages, and deaths, payment of money, intestacies, or the like; as also all expenses attending the production and comparison of title-deeds, wills, and other evidences of title, whether in the possession of the vendor or not; all of which, unless protected by some provision to the contrary, he is bound to produce, though in point of fact he may have no power or control whatever over them (*Southby* v. *Hutt*, 2 Myl. & Cra. 207); as he also is the examination of court-rolls where the property is copyhold (*Whitbread* v. *Jordan*, 1 You. & Coll. 317), as well as the costs of journeys and other incidental expenses necessary for any of the above purposes. Unless, therefore, the vendor intends to take all these burdens upon his own shoulders, the following clause should be inserted:—

Stipulation that conveyance, &c. of outstanding estates shall be borne by purchaser.

8. That the conveyance, assignment, or surrender of any outstanding estate, term, and interest, and the obtaining any probate, administration, or any document required for that purpose, or for evidencing the title thereto, shall be borne by the purchaser. And recitals of descents, births, marriages, deaths, heirships, intestacies, devises, vestings of terms of years, and all other facts of what nature or kind soever contained in deeds or court-rolls of twenty years old and upwards, shall be deemed sufficient evidence thereof respectively. And that the purchaser shall bear the expense of production of all muniments of title not in the possession of the vendor, as also of all travelling and other incidental expenses attending the examination thereof, and the costs of procuring any attested or other copies or extracts, or office-copies of deeds, wills, fines, recoveries, or other documents which such purchaser may require for the purpose of verifying the abstract, or otherwise; or of any deeds of covenant for the production of the same.

As to copies of deeds, &c.

In that part of the above clause which relates to the furnishing of attested copies, the words

"attested *or other* copies" should always be inserted; for instances have occurred in which purchasers, or rather their solicitors, have taken advantage of the omission of the words "or other," and have demanded simple fair copies at the expense of the vendors, which demands have been complied with rather than litigate the matter, and thus the vendors were led into an expense they certainly intended to have guarded against, and which the insertion of two words would have effectually protected them from.

How vendor may protect himself in case of defective title.

In case a vendor has a defective title, he may protect himself by stipulating to sell with such a title as he actually possesses. In a case of this kind, however, care should be taken to frame the conditions in a clear and accurate manner, so as to be free from all ambiguity; for conditions are looked upon by the courts with great caution and jealousy: (*Treme* v. *Wright*, 4 Mac. 364; *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *Southby* v. *Hutt*, 2 Myl. & Cr. 207.) If a vendor means to exclude a purchaser from that which is a matter of common right, he is bound to express himself in terms the most clear and unambiguous; and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather to the purchaser than to the vendor: (*Symons* v. *James*, 1 You. & Coll. C. C. 490; *Morley* v. *Cook*, 2 Hare, 115.) Still for all this, a purchaser will not be allowed to take undue advantage of the omission of special conditions. And even a stipulation that a vendor will give such a title as shall be satisfactory to the purchaser, it has been held will not authorize the purchaser to make any other than the usual objections to the title: (*Lord* v. *Stephens*, 1 You. & Coll. 222; *Lewis* v. *Lechmere*, 10 Mod. 105.)

Purchaser not allowed to take advantage of omission of special conditions.

Title deeds.

It is a common stipulation to provide "That the purchaser shall be at the expense of com-

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paring title-deeds, wills, and other documents and evidences of title, whether of record or not, and whether in possession of the vendor or not, with the abstract, the vendor engaging to furnish such abstract, and to inform the purchaser when and where such deeds, wills, documents, and other evidences of title, if of record, were proved and recorded; and where and with whom such of the title-deeds as are not of record, and not in the custody of the vendor, are to be found, in order that they may be so produced and compared. Sometimes, in order to save the expense of an abstract in the case of small purchases, the vendor stipulates to hand over the title deeds to the latter, at the same time entering into a guarantee to keep them safe, and to deliver upon demand without charge; but that the vendor shall not be required to deliver any abstract, or incur any expense in making out, or clearing up the title, or in conveying the property to the purchaser, or otherwise in relation thereto.

As to the possession of the title-deeds.

It will also be necessary to make some stipulation as to the possession of the title-deeds, either when the vendor himself intends to retain them, or the estate is sold in parcels to distinct parties.

If the vendor is to retain them, then insert—

Title-deeds relating to other property to be retained by vendor.

9. That such of the title-deeds, writings, and muniments of title relating to the said premises, as shall relate also to other property of the vendor of equal or greater value, shall be retained by him [on his delivering at his own expense true and attested copies of them duly stamped, and] on entering into the usual covenant (to be prepared at his own expense), for producing the originals; but such covenant shall become void if the vendor shall afterwards sell any portion of the property retained by him, and deliver the same deeds, writings, and muniments of title to the purchaser thereof, and procure such purchaser to enter into the same or the like covenants.

Attested copies.

Where the purchaser is to be at the expense

of the attested copies, and of the covenants for the production of the originals, omit the words that are between the brackets in the above form, and substitute in their place—

Expense of attested copies, &c. to be borne by purchaser.

And the expense of all attested or other copies of the said deeds, writings, and muniments of title, or extracts therefrom respectively, and of all covenants for the production of the same that shall be required shall be borne by the purchaser.

In sales of copyholds, it should be stated by whom the expense of surrenders and admissions is to be borne.

If the property sold is copyhold, it should be stated by whom the expenses of the surrenders and admittances are to be defrayed. In the absence of any express stipulation, the purchaser is liable to the payment of both the surrender and of his own admittance, and the fine payable thereupon: (*Drury* v. *Mann*, 1 Atk. 95.) When, therefore, it is intended that these charges are to borne by the vendor, it should be so stated; and this should in express terms be extended to the fine, when it is intended that the vendor is to be the party to pay it; as an agreement, or even a covenant from the vendor, to convey and assure the copyholds at his own expense, will not make him liable to the payment of the fine; the title being perfected by the admission, and the fine not payable till afterwards: (*Graham* v. *Sime*, 1 East, 632; and see 1 Wat. Cop. 347, edit. Coventry, n. (1); see also, *Dalton* v. *Hammond*, Cro. Eliz. 779; *Fisher* v. *Rogers*, 1 Roll. Abr. 506, pl. 1; *Rex.* v. *Lord of the Manor of Hendon*, 2 T. R. 434.)

Entailment —Acknowledgments of married women.

When it is necessary to bar any estates tail, or the acknowledgments of any married women are likely to be required to perfect the title, it is generally stipulated that these expenses shall be defrayed by the vendor; although it is perfectly clear that if these assurances were necessary, the vendor would be obliged to furnish them at his own costs, whether he stipulated to do so or not. The clause usually runs thus:—

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Vendor to defray expenses of disentailing deeds and acknowledgments of married women.

9. That the vendor shall bear the expense of all disentailing deeds or other assurances, if any such shall be necessary, for the purpose of barring any estates tail in the premises; as also all expenses to be incurred in taking the acknowledgments of any married women who may be necessary parties to the conveyance.

Timber and fixtures.

If it is intended that the purchaser is to pay for the timber growing on the estate, it should be so stated, otherwise it will pass as part of the freehold to which it is attached; and the same rule also holds with respect to other fixtures annexed to the freehold, if these are of such a nature as would descend with the estate to the heir: (*Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Ex parte Lloyd*, 1 Mont. & Ayr. 464; *Langstaff* v. *Meagoe*, 2 Ad. & El. 176; *Hitchman* v. *Walton*, 4 Mees. & Wels. 409.) In the clause relating to timber, it should be mentioned what trees are to be so considered; for notwithstanding that a general agreement to pay for timber would comprehend trees not strictly such, if so considered according to the custom of the country, as beech in Buckinghamshire (*Duke of Chandos* v. *Talbot*, 2 P. Wms. 601; *Rabbit* v. *Raikes*, Woodf. Landl. and Ten. 224; *Aubrey* v. *Fisher*, 10 East, 446); yet as proof of a custom of this kind may sometimes be attended with difficulty, or occasion disputes, it will ever be the more prudent course to avoid both, by enumerating what description of trees are to be so considered. The following clause may be found serviceable for this purpose:

Purchasers to take timber at a valuation.

10. That the purchaser (or respective purchasers) shall take at a fair valuation, in the usual way, the timber, timber-like trees, saplings, standils, tellers, and pollards, as well of ash, oak, elm, beech, fir, and sycamore, as of any other description whatsoever, and whether growing from seed or from old stools, (except apple and other fruit-trees now growing on the premises), down to the value of 1*s.* a stick inclusive; and also all coppice now growing on the said premises; and all trees, sap-

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lings, standils, tellers, and pollards, above enumerated as timber, are to be so considered, although not strictly such according to the custom of the country. And in case of any disagreement, the value shall be fixed by two persons—one to be chosen by the vendor and the other by the purchaser—who, if they cannot agree, shall call in an umpire, whose determination shall be final between the parties; and in case either the vendor or purchaser shall refuse or fail to name a referee, the determination of the referee appointed by the other party shall be final and conclusive on both parties.

In case of disagreement, value to be fixed by arbitration.

Where fixtures are to be paid for, it will be proper to stipulate,

Stipulation where fixtures are to be paid for.

That the fixtures mentioned and set forth in the schedule hereunto annexed shall be taken by the purchaser at a valuation, the amount of which (if disputed) shall be settled by the award of two referees and an umpire in manner hereinbefore mentioned, whose decision shall be final between the parties.

Fixtures to be taken by purchaser at a valuation.

In the absence of a stipulation of this nature, common fixtures would pass with the property to which they are attached: (*Colegrave* v. *Dias Santos*, 2 B. & C. 76; S. C. 3 D. & R. 255; *Langstaff* v. *Meagoe*, 2 Ad. & Ell. 167; *Hitchman* v. *Walton*, 4 Mees. & Wels. 409.) With respect to what are to be considered as common fixtures, the authorities are not altogether satisfactory. Upon the whole, however, where upon the sale of a house, fixtures are stipulated to be taken at a valuation, those things only are in strictness to be included in such valuation as would be deemed personal assets as between heir and executor, and which would not pass with the inheritance as part of the freehold of the house. To avoid all questions, however, upon this head, the proper way will be to set out all the articles to be paid for in the schedule, in accordance with the condition last above stated: (see Amos & Fer. 186.)

Fixtures, in the absence of a stipulation to the contrary, pass with property to which they are attached.

It is also usual, in the next place, to insert a clause providing that a misdescription shall not

Misdescription.

annul the sale, but that an equivalent shall be allowed by way of compensation. Still this clause, as we have already seen, will afford a vendor no protection against a wilful misrepresentation, its proper object being to guard against unintentional errors, and such as easily admit of compensation: (*Duke of Norfolk* v. *Worthy*, 1 Camp. N. P. C. 337; *Fenton* v. *Brown*, 14 Ves. 144; *Stewart* v. *Alliston*, 1 Mer. 26; *Trower* v. *Newcombe*, 3 *ib.* 704.) The clause usually runs to the following effect :—

Error in description not to annul sale, but to be made good by compensation.

11. The number of the acres are believed to be correctly stated, but are not warranted to be so; but should any error appear to have been made therein, to the prejudice of the purchaser, or any error in the description of the property, or of the vendor's interest therein, such error shall not annul the sale, but the purchaser shall accept such compensation as shall be fixed by two referees, one to be chosen by the vendor, and the other by the purchaser, who, if they cannot agree, shall call in an umpire, whose determination shall be final between the parties. And in case either the vendor or purchaser shall refuse or fail to appoint a referee, the determination of the referee appointed by the other party shall be final and conclusive on both parties.

Sale in lots.

If the estate is sold in lots, the following clause should also be added :—

Defective title in some of the lots not to vitiate sale.

12. That if it should appear that a good title cannot be made to part of the lands comprised in any lot or lots, this shall not annul the sale in respect of such entire lot or lots, but the contract shall be carried into effect as to the residue of the property comprised in such lot or lots, and a proportionate reduction made in the purchase-money, to be fixed by two referees, or their umpire, chosen as aforesaid, whose decision shall be final and conclusive on both parties.

Boundaries, where freehold and copyhold lie intermixed.

Where freehold and copyhold lands lie intermixed together, or there is any uncertainty or confusion as to the exact boundaries, it should be stated—

13. That where, on account of any of the property having been conveyed or passed under a general description, or hedges having been pulled down, or other evidence of seisin or identity of boundaries is not afforded on the face of the deeds, or court-rolls, a declaration, in pursuance of the Act of the 5th and 6th years of the reign of his late Majesty King William the Fourth, for the suppression of extra-judicial oaths and affidavits, of the possession or receipt of the rents for twenty years and upwards, according to the title deduced, or of the identity of the premises, shall, in any case not especially provided for by these conditions, be deemed sufficient evidence of the seisin or identity.

Declaration to be evidence of seisin, &c.

When it is intended that the purchaser of largest amount in value shall retain the title-deeds, it should be stipulated that they are to be delivered over to him upon entering into the usual covenant for their production, viz.:—

When largest purchaser is to retain title deeds.

14. That the purchaser of the largest amount in value shall be entitled to the title-deeds, which are to be delivered over to him on the completion of the purchase, upon his entering into the usual covenant for their production; but any purchaser, upon the completion of his purchase, shall be entitled, at his own expense, to attested copies of all or any of such deeds, but no part of such expense is to be borne by the vendor.

Stipulation that purchaser shall be entitled to deeds, &c.

In case the vendor is not in the possession of the title-deeds, and is desirous of protecting himself from being compelled to produce them, he should insert an express stipulation that he shall not be obliged to produce any title-deeds or other documents of title which are not in his possession, otherwise the usual condition to deduce a good title will entitle a purchaser to call upon the vendor for the production of every document set out in the abstract, whether they are in his possession or otherwise: (*Southby* v. *Hutt*, 2 Myl. & Cra. 207.)

How vendor should protect himself against being compelled to produce deeds, &c.

It should also be stated at whose expense and by whom the conveyance is to be prepared. In the absence of any express provision to the con-

Costs of conveyance.

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Purchaser's solicitor proper person to prepare conveyance.

trary, the expense of the conveyance must be borne by the purchaser, and it is his duty to prepare it and tender it for execution to the vendor (*Poole* v. *Hill*, 10 L. J. N. S. 80); but the vendor must defray the expenses incidental to the execution. It is, however, sometimes stipulated that the conveyance shall be prepared by the vendor's solicitor, at the expense of the purchaser, and such appears to be the prevailing practice of some of our western counties, particularly Cornwall; but this course of proceeding is attended with a risk and prejudice to purchasers, that very few of them are aware of.

Disadvantages of having conveyance prepared by vendor's solicitor.

By permitting the vendor's agent to prepare the conveyance for them, they adopt him as their agent, which will cause them to be affected by notice of all incumbrances and other matters relating to the property sold, to which such agent may be privy; notice to the agent being considered as equivalent to notice to the principal himself; and thus the latter oftentimes becomes deprived of the equitable protection afforded to purchasers, who have themselves no notice of incumbrances affecting the purchased lands: (*Brotherton* v. *Hatt*, 2 Vern. 574; *Jackson's case*, Lane, 607; *Winged* v. *Lefebury*, 1 Eq. Ca. Abr. 32; *Newstead* v. *Searles*, 1 Atk. 265; *Brook* v. *Bulkeley*, 2 Ves. sen. 408; *Ashley* v. *Baillie*, *ib.* 368; *Verney* v. *Carding*, *ib.* 345; *Crofton* v. *Ormsby*, 2 *ib.* 583; *Dunbar* v. *Frederick*, 2 Ball & B. 304; *Tunstall* v. *Trappes*, 3 Sim. 301.) Nor is this the only objection to employing the vendor's solicitor; for if the vendor were to be guilty of any fraud in the conduct of the sale to which the attorney was privy, the purchaser, notwithstanding his ignorance of the transaction, will be held responsible: (*Bowles* v. *Stewart*, 1 Sch. & Lef. 227; see also *Doe* v. *Martin*, 4 T. R. 39; *Hicks* v. *Morant*, 1 You. & Jerv. 286.)

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When the conveyance is to be prepared according to the regular course of practice, insert the following clause :—

By whom conveyance is to be prepared.

15. That the conveyance shall be prepared by the purchaser's solicitor, at such purchaser's expense, and the same shall be settled and approved on the parts of the vendor and purchaser by their respective solicitors, and the said vendor and purchaser shall each of them respectively pay the charges of his solicitor, as also of any counsel they may respectively employ in the course of the transaction.

Conveyance to be prepared by purchaser's solicitor.

If the conveyance is to be prepared by the vendor's solicitor, then substitute the following clause :—

When conveyance is to be prepared by vendor's solicitor.

That the deed of conveyance shall be prepared by Messrs. A. and B. (*vendor's solicitors*), at the expense of the purchasers.

That conveyance shall be prepared by vendor's solicitor.

Sometimes a specified sum is mentioned, as,

Shall pay for the same conveyance the sum of £ , and for the contract the sum of £ , exclusive of stamp duties and parchment.

Clause where a specified sum is to be paid for the conveyance.

By the last clause of the conditions it is usually provided—

Proviso for resale.

16. That if the purchaser of any or either of the said lots shall neglect or fail to comply with the above conditions, and to complete his, her, or their purchase or purchases, by the time and in manner aforesaid, the money by him, her, or them deposited by way of earnest shall be actually forfeited to the vendor, who shall be at full liberty to resell the premises comprised in the lot or lots bought by such purchaser respectively, either by public auction or private contract, or in such way as the said vendor shall think fit; and if upon such second sale there shall be any deficiency, the purchasers so neglecting to perform the above conditions shall make good such deficiency, together with all costs and expenses attending such re-sale, or incidental thereto. And in case of nonpayment of the same, the whole shall be recoverable by the vendor as and for liquidated

Clause empowering vendor to rescind sale in case purchaser fails to comply with conditions.

Loss by resale to be recovered as liquidated damages.

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damages; but any increase of price which the said premises may produce on such second sale shall belong to the vendor.

Short form of contract should be attached to conditions.

A short form of contract to be signed both by vendor and purchaser, or their lawfully authorized agents, should be attached to the above conditions, which should run to the following effect :—

Short form of contract to be attached to conditions of sale, to be signed both by vendor and purchaser.

I (*purchaser*), of, &c., do hereby for myself, my heirs, executors, and administrators, agree with the said (*vendor*) and his heirs, to become the purchaser of the hereditaments and premises comprised in lot hereinbefore described, subject to the aforegoing conditions, at the price of £ , and I hereby acknowledge that I have this day paid the sum of £ as a deposit, and in part payment of the said purchase-money, into the hands of (*auctioneer or vendor's agent*), pursuant to the fifth condition hereinbefore contained; and I hereby for myself, my heirs, executors, and administrators, agree to pay the remainder of the said purchase-money, and to do all other acts necessary on my or their part or parts to the completion of the purchase, upon the terms mentioned in the aforegoing conditions, at the time and place mentioned in such fifth condition: and I, the said (*vendor*), for myself and my heirs, hereby confirm this contract, and agree to accept the said (*purchaser*) as the purchaser of the said lot , upon the terms expressed and contained in the aforesaid conditions. As witness our hands, this day of 18

| | £ | *s.* | *d.* |
|---|---|---|---|
| Purchase money..... | | | |
| Deposit money ..... | | | |
| Remainder unpaid ..... | £ | | |

Witness,

Duplicate of conditions when admissible.

It is sometimes considered advisable to have duplicates of the conditions of sale, one to be signed by the vendor, and the other by the purchaser, for which the two following forms may be employed :—

1. *Agreement to be signed by vendor or his agent.*

Form of agreement to be signed by vendor only.

I (*vendor or vendor's agent*) do hereby acknowledge that (*purchaser*) has been this day declared the purchaser of the hereditaments and premises comprised in lot , hereinbefore described, subject to the aforegoing conditions, at the price or sum of £ , and that he has also paid the sum of £ as a deposit and in part payment of the said purchase money, in pursuance of the terms of the above conditions; and I do hereby affirm this contract and agree to accept the said (*purchaser*) as the purchaser of the said lot, upon the terms expressed and contained in the aforesaid conditions. As witness my hand, this day of .

| | £ | *s.* | *d.* |
|---|---|---|---|
| Purchase money ..... | | | |
| Deposit money..... | | | |
| Remainder unpaid ..... £ | | | |

Witness,

2. *Agreement to be signed by purchaser or his agent.*

Form of agreement to be signed by purchaser.

I (*purchaser*) do hereby agree with the said (*vendor*) to become the purchaser of the hereditaments and premises comprised in lot , hereinbefore described, subject to the aforesaid conditions, at the price or sum of £ , and have this day paid into the hands of (*auctioneer or vendor's agent*) the sum of £ , to be held and retained by him as a deposit and in part payment of the said purchase money; and I do hereby agree to pay the remainder of the said purchase money, or sum of £ , at the time fixed in and by the above conditions of sale. As witness my hand this day of .

| | £ | *s.* | *d.* |
|---|---|---|---|
| Purchase money ..... | | | |
| Deposit money..... | | | |
| Remainder unpaid ..... £ | | | |

Witness,

As to signatures by agents.

If the agreement be signed by the agent of either party, he should state that he signs as

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such agent, on behalf of his principal (see the form Prec. A. No. II. clauses A. B.); for if he were to sign in his own name, he would become personally bound; a rule that has been carried so far, that it has been holden that even where an agent executed a covenant in his own name, for himself, his heirs, &c., he became personally bound, notwithstanding that he was described in the body of the instrument as covenanting for and on behalf of his principal: (*Appleton* v. *Binks*, 5 East, 148; *Kendray* v. *Hodson*, 5 Esp. N. P. C. 228; *Norton* v. *Herron*, 1 Ry. & Mood. 229; *Spittle* v. *Lavendar*, Moore, 270; *Gray* v. *Gutteridge*, 1 Man. & Ry. 614; *Pell* v. *Stephens*, 2 Myl. & Kee. 334; *Gaby* v. *Driver*, 2 You. & Jerv. 549; *Jones* v. *Littledale*, 6 Ad. & Ell. 48; *Magee* v. *Atkinson*, 2 Mee. & Wels. 440.)

As to special stipulations.

The foregoing are the usual clauses inserted in ordinary conditions of sale; yet before dismissing this part of our subject, it will be proper to make a few observations upon a few other clauses, which, under certain circumstances, may be usefully employed.

In sales of leaseholds, where vendor is unable to procure lessor's title, he should provide against purchaser's requiring it.

In the first place, where the subject-matter of sale consists of leasehold property, and the vendor is unable to procure his lessor's title, he ought, by his conditions, to provide against the purchaser's requiring it (*Fielder* v. *Hooker*, 2 Mer. 424; *Purvis* v. *Rayer*, 9 Pri. 488; *Souter* v. *Drake*, 5 B. & Ad. 992); otherwise he cannot enforce a specific performance against the latter, who, being a purchaser *pro tanto*, is clearly entitled to call for an inspection of the title of the original lessor, before he can be enforced to complete his purchase; but notwithstanding a vendor cannot, under such circumstances, oblige the purchaser (*Rosewell* v. *Vaughan*, Cro. Jac. 196; *Lysney* v. *Selby*, 2 Ld. Raym. 1118; *Keech* v. *Hall*, Doug. 21; *Waring* v. *Mackreth*, 11 Ves.

343) to abide by his contract, it still remains undecided whether a purchaser, insisting on a specific performance, can compel the vendor to produce his lessor's title: and notwithstanding the question was raised in one or two cases which came before Lord Eldon, he never came to any actual decision upon the point, although his preponderating opinion seems to have been, that where there was no express stipulation to the contrary, the purchaser was entitled to call for such production: (*White* v. *Foljambe*, 11 Ves. 337; *Radcliffe* v. *Warrington*, 12 *ib.* 326; *Deverall* v. *Bolton*, 18 *ib.* 505).

How stipulation should be penned where purchaser is not to call for lessor's title.

Where it is intended that the purchaser is not to call for the lessor's title, the following form should be inserted:—

Clause stipulating that purchaser is not to call for lessor's title.

That the vendor, at his own expense, will within [*here state the time*] deliver abstract of title to the purchaser or his solicitor of the original lease of the said premises, and also of all mesne assignments, wills, settlements, and other documents relating to the title of the said term in the premises, and deduce a good title thereto, subject to these conditions; but the purchaser shall not be entitled to call for the title of the lessor.

How terms upon which premises are holden should be set out.

It may also in many instances be proper to state the terms upon which the premises are held; as, for example—

Terms on which premises are holden.

That the lease on which the premises are held is subject to the yearly rent of £ , and also contains the usual lessee's covenants to pay the rent, to keep the premises in repair, and to insure against fire, and not to exercise any trade or business on the premises; and the purchaser must take the premises subject thereto.

Practical suggestions where leaseholds are sold in lots.

Where leasehold premises, held under one entire rent, are intended to be sold in lots, the three following clauses will be found serviceable:

Stipulation that purchasers shall

1. That each of the respective purchasers shall, on the completion of the purchase, at his own expense, execute to the

vendor a bond in the penal sum of £ , conditioned for indemnifying the vendor against the rents and covenants reserved and contained in the original lease in respect of the premises purchased by and assigned to such purchaser.

indemnify vendor against rents and covenants contained in original lease.

2. That as all the lots now offered for sale are included in one lease, subject to one entire rent of £ , of which rent it is intended that each of the said lots shall bear a proportionate part, the purchaser of each lot shall enter into a covenant with the purchasers of the other lots for the payment and performance of his (the covenantor's) proportion of the rents and covenants, and to give to such other purchasers a power of distress on the premises purchased by the covenantor, as an indemnity against such proportion: such deeds of indemnity to be prepared by, and at the expense of, the respective purchasers requiring the same.

Each purchaser to enter into a covenant for payment and performance of his portion of the rents and covenants.

Title-deeds to be delivered to largest purchaser on his covenanting for their production.

3. That the lease and assignments shall be delivered to the purchaser of the lot which shall be sold for the highest price, upon his entering into the usual covenants for the production thereof, with the other purchasers, at the expense of the latter; and if the price of the respective lots shall be equal, the purchaser of lot 1 shall, for the purposes of this condition, be considered as the larger purchaser; but if any of the lots remain unsold, the vendor shall be considered as standing in the place of, and shall have all the privileges which are hereby given to, the largest purchaser.

Practical remarks as to the reservation of interest.

A clause directing that from a certain day the purchaser shall pay a certain per-centage on his purchase-money, and from that time be entitled to the possession and to the rents and profits of the premises, is often a very useful clause, particularly where the property affords an eligible residence, and the vendor is in no hurry for his money, and the purchase cannot at once be carried into effect; as, for example, where some of the parties are under age or abroad, when sending the deeds of conveyance there for execution would be attended with both difficulty and expense; and although the annual amount to be paid in consideration of the occupation of the

premises should exceed the legal rate of interest, still the agreement will not be considered as usurious on that account: (*Spumer* v. *Mayop*, 1 Ves. 257; *Beete* v. *Bigwood*, 7 B. & C. 453.)

The following clause may be employed for the above purpose:—

Clause empowering purchaser to receive rents and profits, and vendor to receive interest on his purchase-money.

That the purchaser shall, from the day of next, enter upon the possession and receive the rents and profits of the said premises for his own use and benefit; and that if the conveyance by all the necessary parties be not completed, and the purchase-money be not paid, on or before the said day of , then and in such case the purchaser shall from that time pay compensation for the said purchase-money to the said vendor, a gross sum of money, to be calculated after the rate of £ for every £100 by the year.

Proper stipulations in sales under fiats in bankruptcy.

Where the property is sold under a fiat in bankruptcy, it will be advisable to stipulate that if the purchaser shall require the fiat or other proceedings under the bankruptcy to be entered of record, it shall be done at his own expense.

Special reservations.

Where the subject-matter of sale is a house, the adjoining land of which belongs to the vendor, and he intends to retain a right of building on the reserved property which may in any way interfere with the lights belonging to the house, he must carefully reserve such right; as it has been held (*Palmer* v. *Fletcher*, 1 Lev. 122), that where a man sells a house, on part of his land, to one person, and the adjacent land to another, the vendee of the house may maintain an action against the vendee of the land for obstructing the lights, although the house be not an ancient house; because the law will not permit the vendor, and by consequence any one claiming under him, to derogate from his own grant: (*Cox* v. *Matthews*, 1 Ventr. 237, 239; *Rosewell* v. *Prior*, 6 Mod. 116; *Crompton* v. *Richards*, 1 Price, 27; *Swansborough* v. *Coventry*, 9 Bing. 305; *Coutts* v. *Gorham*, 1 Mood. & Malk. 396; *Rivière* v.

*Bowman*, 1 Ry. & M. 24.) But in every instance in which this has been so determined, the grant was of the house with the windows then existing, or apparently in the progress of being built; for merely selling land for building purposes will not confer a right to the vendee to the unobstructed enjoyment of any lights he may think fit to open upon any part of the purchased property: (*Blanchard* v. *Bridges*, 4 Ad. & El. 176; see also *Cherrington* v. *Abney*, 2 Vern. 646; *Garrett* v. *Sharpe*, 3 Ad. & El. 325.) A privilege so unlimited would press most unreasonably upon every vendor selling lands for the purpose of being built upon, and retaining those adjoining, as it would preclude him from building so as to obstruct whatever erections or alterations the vendee may at any time choose to make, not only till he has finished the house, but for ever. (See also Mr. Smirke's elaborate argument in *Blanchard* v. *Bridges*, above referred to.) Still the most prudent course will ever be, in those cases where lands are sold for building purposes, to have some express stipulation not only in the contract, but also in the conveyance of the property, with respect to the lights, which, in some cases, it may be advisable to extend to the kind of buildings that are intended to be erected; for cases have occurred in which it has been holden that the merely exhibiting a plan of buildings proposed to be built will not bind a purchaser unless the latter enters into some agreement to build accordingly: (*Feoffees of Heriot's Hospital* v. *Gibson*, 2 Dow. 301; see also *Compton* v. *Richards*, 1 Pr. 27; *Beaumont* v. *Dukes*, Jac. 422; *Squire* v. *Camp*, 1 Myl. & Kee. 459; but see *Swanborough* v. *Coventry*, 9 Bing. 305; 2 Moo. & Scott, 362.)

Duties of purchaser's solicitor.

Should a purchaser retain a professional gentleman to attend on his behalf at the sale, it will become the bounden duty of the latter to look

Observations as to framing conditions in sales under a decree.

carefully into the vendor's conditions, in order to see that they do not press too heavily or unfairly upon a purchaser, by restricting him from insisting upon such a title as may insure him the secure enjoyment of his purchase; as also to discover whether the object of some especial clauses may not be to keep back some important evidence, which, if disclosed, would render the title unmarketable. One object a purchaser's solicitor must never lose sight of throughout the whole course of the transaction; which is, not only to secure such a title as will effectually protect his client from eviction, but also such a title as a subsequent purchaser or mortgagee may be compelled to accept.

In sales under a decree, particulars, &c. should be framed with the same accuracy as in ordinary sales.

When an estate is directed to be sold under a decree of a Court of Equity, the particulars and conditions of sale should be framed with the same care and accuracy as in ordinary sales by auction. These conditions should be headed with the names of the parties in the cause; and must also set forth that the sale is made in pursuance of a decree made in such cause, and with the approbation of the Master. The time and place of sale must be then stated. It should next be mentioned that the estate may be viewed on application to some person named in the particulars; and that the particulars and conditions may be had gratis on application at the Master's chamber, as also at the offices of the solicitors in the cause. (See Smith's Chanc. Pract. 173, 2nd edit.)

## SECTION II.

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*Sales by auction.*

### OF THE MANNER OF CONDUCTING SALES BY AUCTION.

Duties of auctioneer.

By a recent Act of Parliament (8 Vict. c. 15, s. 7), which abolishes auction duties, the auctioneer is directed, under a penalty of 20*l.* to suspend or affix, before he shall commence the sale, a ticket or board, containing his full Christian and surname, and place of residence, in some conspicuous place in the room or place where the auction is held, so that all persons may easily read the same.

Mode of conducting a sale by auction.

The sale itself is usually conducted in the following manner. The particulars and conditions of sale are first read over and explained before the persons assembled, either by the auctioneer himself, or the vendor's solicitor, or some other person employed by them for that purpose. Several copies of the conditions ought to be circulated about the room, in order that every one then and there present may have an opportunity of inspecting them. The property is then put up for sale, either together, or in separate lots, and upon a bidding being made, the auctioneer declares the amount of such bidding; until, no further advance being offered, the lot is either knocked down to the highest bidder, or bought in again on behalf of the vendor.

What will constitute a valid sale.

But, notwithstanding it has been always considered that the vendor's assent to the sale is

signified by the knocking down of the hammer (*Payne* v. *Cave*, 3 T. R. 148), it is quite clear that this can never constitute such a valid agreement within the Statute of Frauds (29 Car. 2, c. 3) as will sustain an action in case of its nonperformance: (*Walker* v. *Constable*, 2 Esp. N. P. C. 659; 1 Bos. & Pull. 306, S. C.; see also Selw. N. P. 172, 9th edit.) Still, as the auctioneer is considered the agent for both buyer and seller (*Hine* v. *Whitehouse*, 7 East, 557; *Kemys* v. *Proctor*, 3 Ves. & Bea. 57), the signing of the agreement by him will be binding on the person on whose behalf he so signs (*Emerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 *ib.* 209; *Heyman* v. *Neale*, 2 Camp. N. P. C. 337; *Pauls* v. *Simes*, 6 Car. & Pay. 506; *Farmer* v. *Robinson*, 2 Camp. N. P. C. 339, (n.); *Gale* v. *Wells*, 1 Car. & Pay. 388; *Trueman* v. *Loder*, 3 Per. & Dav. 267); for the agreement is then signed by the lawfully authorized agent of the party to be bound by it, whose appointment it has been long determined need not be by writing: (*Weller* v. *Hudson*, 5 Vin. Abr. 524; *Widderbourne* v. *Carr*, 3 Woodes, cited; *Rucker* v. *Cammeyer*, 1 Esp. N. P. C. 105; *Coles* v. *Tregothic*, 9 Ves. 234; *Barry* v. *Barrimore* (*Lord*), 1 Sch. & Lef. 28, cited.) The usual practice, as remarked in the latter part of the preceding section, is, to have a short form of contract attached to the conditions of sale, which, when duly signed by the necessary parties, becomes embodied with the terms of the conditions; the whole together forming the subject-matter of one entire contract: (*Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Allen* v. *Bennett*, 3 Taunt. 139; *Cooper* v. *Smith*, 15 East, 103; *Richards* v. *Porter*, 6 B. & C. 437; *Dobell* v. *Hutchinson*, 3 Ad. & El. 355. See also *Shippey* v. *Derrison*, 5 Esp. N. P. C. 190; *Brodie* v. *St. Paul*, 1 Ves. 326; *Tawney* v. *Crowther*, 3 Bro. C. C. 318; *Hinde*

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v. *White*, 8 East, 558; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Fowle* v. *Freeman*, 9 Ves. 351; *Rose* v. *Cunningham*, 11 *ib.* 550; *Price* v. *Leyburn*, Gow. 109.) But although the above is the proper and more regular practice, still a simple entry of the purchaser's name by the auctioneer, referring to the lot for which he bid, will be a sufficient signing on behalf of the purchaser to be binding on him; as will also the auctioneer's signature to a receipt for the deposit, if it refers sufficiently to the contracting parties and subject-matter of sale, or to the conditions, to show the nature of the contract.

How far bidding may be retracted.

A bidding is not completed until the falling of the auctioneer's hammer, and may consequently be retracted at any time before the lot is actually knocked down (*Payne* v. *Cave*, 3 T. R. 148; *Routlege* v. *Grant*, 4 Bing. 653); but then such retraction must be made in a tone sufficiently audible for the auctioneer to hear, or by such gestures as he can readily understand; otherwise such retraction will, like a mere mental reservation, amount to nothing at all, and the party will still be held to his bidding: (*Jones* v. *Nanney*, 3 Camp. N. P. C. 385; 13 Pri. 102, 103; S. C. M'Clel. 39.)

Auctioneer considered a stakeholder of deposit.

The auctioneer is considered as the stakeholder of the deposit; and therefore, if he pays it over to the vendor without any direction from the purchaser, he does so at the risk of being personally accountable for it to such purchaser, in case the title should prove defective. But in such case the auctioneer will be entitled to recover back such deposit-money from his employer, but not the costs of defending the action brought by the purchaser for the recovery of it, unless the vendor had authorized the defence; nor without declaring specially: (*Spurrier* v. *Elderton*, 5 Esp. N. P. C. 1; *Burrough* v. *Skinner*, 5 Bur. 2659; *Ambrose* v. *Ambrose*, 1 Cox, 194; *Gray* v. *Gut-*

*teridge*, 1 Man. & Ry. 614; *Duncan* v. *Cafe*, 2 Mees. & Wels. 244.) The inconveniences, however, which might arise in consequence of an auctioneer paying over the deposit to the vendor are now commonly guarded against by a clause in the conditions, directing that the deposit shall be paid into the hands of the vendor or his agent; in which case, if it be so paid, the auctioneer will be discharged from all responsibility on that account. (*See the Form, sup.* No. V.)

How auctioneer may protect himself under interpleader act.

In the absence of any provision to the above effect, the auctioneer has it still in his power, in case both vendor and purchaser claim the deposit, to protect himself under the Interpleader Act (1 & 2 Will. 4, c. 58); or he may file his bill in equity, praying an injunction, which will be granted him upon his paying the deposit into court; but he will not obtain this unless he pays in the full amount of deposit; for should he insist upon retaining his own commission, or any other claims he may consider himself entitled to out of it, he will by that means debar himself of all right to equitable assistance: (*Farebrother* v. *Prattent*, 1 Dan. 64; *Nerrot* v. *Harris*, *ib.* 68 (n.); *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63; see also 1 Mad. Pract. 179, 2nd edit.) Being in the nature of a stakeholder, and so bound to produce the deposit-money at any time when called upon, the auctioneer is not liable to the payment of any interest for it whilst it remains in his hands; nor, it seems, will it make any difference if the vendor were (*without the purchaser's concurrence*) to give the auctioneer notice to invest the money in government securities, and although interest may actually have been made of it: (*Harrington* v. *Hoggart*, 1 B. & Ad. 577; see also *Salisbury* (*Lord*) v. *Wilkinson*, 8 Ves. 48.) To make an auctioneer liable for interest, it must appear, 1st, That the contract, on failure of the condition, has been rescinded. 2nd, That a de-

mand of deposit has been made, and a refusal to return it (*Lee* v. *Munn*, 8 Taunt. 55; see also 1 Selw. N. P. 177, 9th edit.); and even then, according to the opinion expressed by Burrough, J., in *Curling* v. *Shuttleworth* (6 Bing. 134), it must be proved that the auctioneer has actually made interest of the money. When, therefore, the deposit is considerable, and some time likely to elapse before the purchase is completed, it seems advisable to enter into some arrangement with respect to the deposit, as, that it shall be invested in the funds, or paid into the hands of some bankers, to be agreed upon between the parties, who are to allow interest for the same, as long as it remains in their possession.

Duties and responsibilities of auctioneer.

An auctioneer having no authority from his employer to that effect, renders himself personally responsible for any losses that may be incurred in consequence of his giving the purchaser credit for the deposit, or any other moneys to be paid by the latter in respect of the purchase (*Williams* v. *Millington*, 1 H. Black. 81; *Wilshire* v. *Sims*, 1 Camp. N. P. C. 258); as also for any securities he may take from the purchaser for that purpose; as promissory notes, bills of exchange, or the like: (*Ib. id.*) An auctioneer should also be cautious about selling, where he has the slightest doubt as to his authority to do so (*Nelthorpe* v. *Adridge*, 2 Stark. N. P. C. 435); otherwise he will become personally liable to the purchaser for any expenses the latter may have incurred, in case the principal should refuse to ratify the contract, as well as interest on the purchase-money where the latter has remained unproductive: (*Nelthorpe* v. *Adridge*, 2 Stark. N. P. C. 439; *Gaby* v. *Driver*, 2 You. & Jerv. 549; see also *Bratt* v. *Ellis*, cited 2 Stark. N. P. C. 552; *Jones* v. *Dike*, *ib.* 553.) An auctioneer should always, indeed, take care to name his principal, otherwise he himself becomes responsible should

it turn out that he has not the means of procuring a ratification of the contract: (*Hanson* v. *Robedeau*, Peake, N. P. C. 120; 1 Selw. N. P. 176, 9th edit.) The auctioneer should also take especial care to see that the conditions of sale are properly penned; for in case the sale should be defeated by any negligence on his part in this matter, he would not be entitled to any remuneration for his services; nor would it make any difference even if it were shown that such conditions were read over and approved of by the vendor: (*Denew* v. *Deverall*, 3 Camp. N. P. C. 451; *Jones* v. *Nanney*, 13 Pri. 76.)

Losses incurred by insolvency of auctioneer must be borne by vendor.

Any losses that may be incurred during the progress of the sale, in consequence of the auctioneer becoming insolvent, must be borne by the vendor, whose agent he properly is for every purpose connected with the auction, and appointed by him for that very express purpose; but as far as the purchaser is concerned, an auctioneer can only be considered as having a special authority to sign such purchaser's name to the bidding. In every other respect he is the agent of the vendor, by whom he is selected, under whose authority he acts, and who alone can be supposed to have placed any confidence in him: (*Brown* v. *Fenton*, 14 Ves. 144; *Benjamin* v. *Porteous*, 2 H. Bl. 590, 592; *Sanderson* v. *Walker*, 13 Ves. 601, 602; *Fenton* v. *Browne*, 14 *ib.* 150.)

*Denew* v. *Deverall* considered.

In *Denew* v. *Deverall*, above referred to, an auctioneer brought his action for his commission for selling leasehold property by auction to the defendant. It appeared in evidence that the plaintiff had omitted to introduce a proviso in the conditions of sale, "*that the vendor should not be called upon to produce his lessor's title*," in consequence of which omission the purchaser had declined to fulfil his contract; a court of equity had refused a specific performance, and the de-

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posit had been recovered back from the defendant. It was proved that the insertion of such a clause was usual; and it was contended, that as the defendant had lost all benefit from the plaintiff's service, for which he now claimed compensation, the action could not be sustained.

Auctioneer, if guilty of neglect, entitled to no remuneration for his services.

LORD ELLENBOROUGH, C. J.—The plaintiff appears to have been guilty of gross negligence, and the defendant has suffered an injury instead of deriving any benefit from employing him. A practice has very properly sprung up among auctioneers, in selling leasehold property, to stipulate that the vendor shall not be called upon to show the lessor's title. It was incumbent on the plaintiff to take notice of this practice; but having been guilty of a deviation from it, he has involved his employer in a series of expensive litigation. It is no answer that the particulars were shown to him. I pay an auctioneer as I do any other professional man for the exercise of skill I do not possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If, from his ignorance or carelessness, he leads me into mischief, he cannot ask for recompense; although from a misplaced confidence I followed his advice without remonstrance: (see also *Hamond* v. *Holliday*, 1 Car. & P. 384; *White* v. *Chapman*, 1 Stark. N. P. C. 113; *Hurst* v. *Holding*, 3 Taunt. 32.)

What amount of remuneration an auctioneer is entitled to.

With respect to the amount of remuneration to which an auctioneer is entitled for conducting a sale, it seems that this may be either regulated by a special contract betwixt him and his employer, or in the absence of such agreement to a fair *quantum meruit* for his services: (*Mallby* v. *Christie*, 1 Esp. N. P. C. 430.) In special agreements the auctioneer usually receives a certain per-centage by way of commission, but this claim can only be supported where there is an express agreement to that effect; in

the absence of such agreement he will be entitled to remuneration for services only; still the amount of remuneration will be determined by the usage of trade (*Eicke* v. *Meyer*, 3 Camp. N.P.C. 412); and where it can be shown that a particular commission is commonly charged, and that the seller was aware of the custom, that would in most cases afford a fair and reasonable guide as to the amount of remuneration. But if the payment is dependent upon a contingency, it cannot be recovered until such contingency shall have taken place: (*Winter* v. *Mair*, 3 Taunt. 531; *Roberts* v. *Jackson*, 2 Stark. N. P. C. 225; *Bull* v. *Price*, 7 Bing. 237; S. C. 5 Moo. & P. 2.)

Of the auctioneer's lien.

The auctioneer, provided he conducts the sale properly, has a lien not only on the deposit, but also on any goods of his employer which may chance to be in his possession (*Mann* v. *Shefner*, 2 East, 259; *Curtis* v. *Barclay*, 5 B. & C. 141; see also *Drinkwater* v. *Goodwin*, Cowp. 251), for his commission and expenses.

When auction duty would formerly have attached.

As soon as the contract was signed, the auction duty would formerly have attached, which, in the absence of any express provision to the contrary, must have been discharged by the vendor (stat. 27 Geo. 3, c. 13; 37 Geo. 3, c. 14); though this would not have prevented an arrangement from being entered into between the parties for the purpose of paying it in any other manner (*Malins* v. *Freeman*, 4 Bing. N. C. 395); and, generally speaking, a clause used to be inserted in the conditions, that the auction duty should be paid by the purchaser; but now the auction duties, as before remarked (*sup.* pp. 15, 29), are repealed by the recent statute 8 Vict. c. 15, s. 1. Previously, indeed, to this statute, some sales of real property were altogether exempt from auction duty, viz., sales under decree of a court of equity; auctions holden by the lord of a manor for granting copyhold estates for life or years

What sales were exempt from auction duty.

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*Sales by auction.*

(stat. 19 Geo. 3, c. 56, s. 13); auctions for leasing estates for lives or years (*ib.*; *Rex* v. *Ellis*, 3 Pri. 323); estates sold by the sheriff for the benefit of creditors (*ib.* s. 15); as also sales of the estates of bankrupts (6 Geo. 4, c. 16, s. 98), and insolvent debtors (7 Geo. 4, c. 57, s. 87; 1 & 2 Vict. c. 110); sales for the redemption of the land-tax (42 Geo. 3, c. 116, s. 113), and also sales of crown lands by the Commissioners of Woods and Forests. Added to this, the auction duty would have been remitted where an estate was bought in on behalf of the vendor, in order to prevent its being sold at an under-value, provided the proper notice were given and verified, on the oath of the auctioneer, as to the fairness of the transaction: (17 Geo. 3, c. 50, s. 10; 19 Geo. 3, c. 56, s. 12.) And even when the property was actually knocked down to a purchaser, and the contract proceeded in, still, if no title could have been made to it, the duty would have been remitted on application to the Commissioners of Excise, or two justices of the peace, within twelve calendar months after the abandonment of the sale, or within three months after the discovery of the defective state of the title: (6 Geo. 3, c. 56, s. 11.) But notwithstanding the exemptions above enumerated, the duty proved a never-failing clog to sales by auction. Any informality in the notices or conduct of the sale in those cases where the property was bought in would have caused the duty to attach: (*Cruso* v. *Crisp*, 3 East, 337; *Capp* v. *Topham*, 6 East, 392; *Christie* v. *Attorney-General*, 6 Bro. P. C. 256; edit. Toml.; *Denew* v. *Deverall*, 3 Camp. N. P. C. 451.) And, notwithstanding, as I have just before stated, the auction duty would have been remitted where the vendor was unable to make a title; still, before this could have been done, satisfactory proof must have been adduced before

Any informality would have caused duty to attach.

the commissioners, or justices, that the vendor had done everything in his power to render the title marketable. There was certainly an appeal from the judgment of such commissioners, or justices, in case they refused to remit the duty; but, at the same time, as the crown never pays costs, the expenses of prosecuting such an appeal, even when successful, must, in many instances, have exceeded the actual amount of the duty. In order to avoid the payment of this duty, it became a very common practice for the vendor to buy in the estate, and afterwards to enter into a negotiation with the highest bidder; so that a sale by auction became, in a great number of instances, nothing more in reality than a mere preliminary proceeding to a sale by private contract. But now the auction duties being happily swept away by the statute of 8 Vict. c. 15, and, it is to be hoped, never again to be restored, actual *bonâ fide* sales by auction without reserve, will doubtless become far more frequent than formerly; which cannot fail to tend very considerably towards facilitating the sales of landed property throughout this kingdom.

Puffing will vitiate sale.

Before dismissing this portion of our subject, it may not be improper to caution vendors against employing puffers to bid for the property, for the purpose of screwing up the price. Such a course of proceeding is a fraud upon the real bidders, and would, if discovered, afford a purchaser sufficient ground for declining to complete his purchase: (*Howard* v. *Castle*, 6 T. R. 642; *Wheeler* v. *Collier*, 1 Mood. & Malk. 123; *Crowder* v. *Austen*, 3 Bing. 368; *R.* v. *Marsh*, 3 You. & Jerv. 331; see also *Twining* v. *Morrice*, 2 Bro. C. C. 326; *Bramley* v. *Alt*, 3 Ves. 620.) Neither, on the other hand, should a person desirous of buying the property use any disparaging terms respecting it, in order to deter others from competing with him in offering for

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it; as in such case he would neither be allowed to enforce his contract, nor to support an action for the nonperformance of it: (*Fuller* v. *Abrahams*, 6 Mo. 316; 3 Bro. & Bing. 116, S.C.) And if this disparagement or slander of title can be shown to be maliciously or wantonly done, and the vendor is in consequence prevented from selling the estate, the latter may maintain an action against the offending party, and recover consequential damages in proportion to the amount of injury sustained: (Cro. Jac. 213; Cro. Eliz. 279; 3 Blac. Com. 124; *Lowe* v. *Harewood*, Sir W. Jones, 196; *Malachy* v. *Solper*, 3 Bing. N. C. 383; 3 Scott, 736, S.C.) But it seems that an action of this kind cannot be maintained against a party who at the time of the sale claims the estate as his own property (*Smith* v. *Spooner*, 3 Taunt. 246; *Pitt* v. *Donovan*, 1 M. & S. 639; *Watson* v. *Reynolds*, 1 M. & Malk. 1), or at any rate without showing that such claim was made through mere malice, and with no other view than to injure the vendor; for the mere act of making an unfounded claim will be insufficient to support an action for slander of title (*Watson* v. *Reynolds*, 1 Mood. & Malk. 1); to maintain which, it is requisite to show malice in the defendant, either express or implied (*Hargrave* v. *Le Breton*, 4 Bur. 2422); added to which, special damage must be alleged in the declaration, and proved in evidence at the trial of the cause: (*Malachy* v. *Solper*, *supra.*) It must also be kept in mind that the rule against puffing does not take in those cases in which a vendor, *bonâ fide* and without fraud, employs a third party to buy in the estate for him, in order to prevent it from being sold at an under-value: (*Smith* v. *Clarke*, 12 Ves. 477; and see *Oldfield* v. *Round*, 5 Ves. 508.)

In such case, however, it seems that only one person must be appointed to bid on behalf of

the vendor; for if two or more persons do so it will be considered in the light of puffing, and vitiate the sale: (*Conolly* v. *Parsons*, 3 Ves. 625; *Twining* v. *Morrice*, 2 Bro. C. C. 26; *Rex* v. *Marsh*, 3 Y. & J. 331; *Crowder* v. *Austen*, 3 Bing. 386; *Wheeler* v. *Collier*, 1 Mood. & Malk. 123.) And when the estate is advertised to be sold without reserve, the sale would be void as against a purchaser if any person were to bid on behalf of the vendor: (*Meadows* v. *Tanner*, 5 Mad. 34.) The plain meaning of the words "*without reserve*" in a particular of sale is, that no person will be employed to bid on behalf of the vendor, for the purpose of keeping up the price; and a vendor can have no claim to the aid of a court of equity to enforce a contract against a purchaser in which he might have been drawn by the vendor's want of faith. The proper course for the vendor, where he intends to buy in the property unless it reaches a certain price, is to give public notice that he intends to reserve a bidding, and will bid once in the course of the sale: (see *Jervoise* v. *Clarke*, 1 Jac. & Walk. 399; see the form *ante*, p. 28.)

## SECTION III.



### SALES UNDER A DECREE.

*Sales under a decree.*

IN sales under a decree, the practice is for each bidder to sign his name to the sum he offers in the space, or in the particulars under the lot for which he bids (1 Turn. Pract. 129), and the highest bidder is declared to be the purchaser, as in ordinary sales by auction; although he does not become so, in fact, until the confirmation of the Master's report. To obtain this, the purchaser must make an application to the Master, at his own expense, to report him to be the purchaser, which report is then filed, and an office copy taken, and delivered to such purchaser. The next step is for him either to present a common petition, or to move for an order that the report may be confirmed *nisi:* (Fowl. Pract. 307; 2 Smith's Pract. 184, 2nd edit.) On the eighth day after the expiration of the order *nisi*, and of a certificate, obtained at the registrar's office, of no cause having been shown, the order *nisi* may be made absolute: (2 Smith's Pract. 186, 2nd edit.)

How report may be made absolute in the first instance.

But where the parties are not numerous, and are able and willing to consent to the arrangement, the order *nisi* may be altogether dispensed with, and the report confirmed absolutely in the first instance. To effect this, the purchaser presents a petition, as of course, to the Master of the Rolls, praying for an absolute confirmation of the report. (*Ib.*) The same object, indeed,

may be arrived at by a motion of course, all parties giving consent briefs; but the former, being the most expeditious, as well as least expensive mode of proceeding, is the preferable one in every respect. (*Ib.*)

Vendor may move to confirm order in case purchaser neglects doing so.

Should the purchaser, after having obtained the order *nisi*, fail to confirm the order, the vendor himself may make the motion: (*Chillingworth* v. *Chillingworth*, 1 Sim. & Stu. 291.)

As to opening the biddings.

The usual cause shown against a purchaser confirming his report absolutely, is an application by some other party to open the biddings. This right of opening the biddings, after a party has, at a public sale, been declared the purchaser, is a peculiar property incidental to sales under a decree. The object of it is to obtain as high a price as can possibly be gotten for the property, though instances are not wanting in which it has produced a totally opposite effect, and it is a subject upon which very divided opinions have been long entertained. By some, it has been thought to do more harm than good; by others, that the right should be even less restricted than it is: (2 Mad. Pract. 501, 2nd edit.) The biddings may, however, be opened more than once, and that, even at the instigation of the same party, where sufficient cause is shown (*Scott* v. *Nisbett*, 3 Bro. C. C. 475; *Hodges* v. *Jones*, 2 Fowl. Pract. 318; *Upton* v. *Lord Ferrers*, 4 Ves. 700; *Rigby* v. *M'Namara*, 6 *ib.* 617; *Preston* v. *Barker*, 16 *ib.* 140); and some instances *have* occurred where the biddings have been opened even after the confirmation of the Master's report; as, for example, where a great increase of price has been offered, coupled with the circumstance that the party for whose benefit the sale was made was in prison: (*Bowyer* v. *Backwell*, 3 Anstr. 656; *White* v. *Wilson*, 14 Ves. 153; *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 350.) But, generally speaking, the

court will refuse to open the biddings after the confirmation of the report (*Morrice* v. *Bishop of Durham*, 11 Ves. 57; *Chatham* v. *Grugeon*, 5 Ves. 86; and see *Scott* v. *Nisbett*, 3 Bro. C. C. 475; *Bowyer* v. *Backwell*, 3 Anstr. 656; *Prideaux* v. *Prideaux*, 1 Bro. C. C. 287); unless some gross fraud has been practised: as, for example, where parties have agreed not to bid against each other; or a fraudulent survey has been made of the premises with the connivance or knowledge of the purchasers, by which the estate is misrepresented in point of extent or value, and the vendor was ignorant of the deception which has been practised; in which case even an absolute confirmation of the report will not prevent the biddings from being again opened: (*Prideaux* v. *Prideaux*, 1 Bro. C. C. 287; *Watson* v. *Birch*, 2 Ves. jun. 51; *Gower* v. *Gower*, 2 Eden, 348; 6 Bro. P. C. 306, edit. Toml.)

Usual ground for application to open biddings.

The usual ground upon which an application to open the bidding is founded, is a further advance in price, though it does not appear to be clearly settled what amount of increase the court will require. Formerly an opinion seems to have been entertained that ten per cent. (*Anon.* 3 Mad. Rep. 494,) on the original purchase-money, where the purchase-money was large, would be received; but no such rule now prevails: (*Bridges* v. *Phillips*, 2 Mad. Pract. 502, 2nd edit. cited; *Andrews* v. *Emerson*, 7 Ves. 4; *White* v. *Wilson*, 14 *ib.* 151.) In many cases a less advance has been holden sufficient, and the biddings have been opened even on so low an advance as five per cent. where the purchase-money has amounted to a considerable sum—as, for instance, 500*l.* on 10,000*l.*; whilst in other cases, where the amount of price was small, advances at a far greater per-centage in proportion to the original sum have been re-

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jected. In *Garston* v. *Edwards*, 1 Sim. & Stu. 20 (see also *Lefroy* v. *Lefroy*, 2 Russ. 606; *Cochrane* v. *Cochrane*, 2 Russ. & Myl. 684), an advance of 30*l.* on 3,500*l.* was refused; whilst in *Laurence* v. *Halliday*, 6 Sim. & Stu. 296, the same offer of advance on a larger amount, viz. 30*l.* on 5,030*l.* was accepted; as also the sum of 365*l.* on 7,300*l.* in the still more recent case of *Domville* v. *Barrington* (2 You. & Coll. 723.) Upon the whole, therefore, it seems that the court is not so much guided by percentage as amount; consequently, where an important sum, as 500*l.* or five per cent. on 10,000*l.* is offered to be advanced, it would probably be accepted, whilst an offer to advance 50*l.*, the same rate of interest, on 1,000*l.*, would be refused; and under any circumstances, where the advance offered is very inconsiderable, as under 40*l.* for instance, the application will be disregarded: (*Farlow* v. *Wielden*, 4 Mad. 460; *Brookfield* v. *Bradley*, 1 Sim. & Stu. 23; *Leland* v. *Griffiths*, 2 Moll. 510.)

Application must be made by motion.

The application to open the biddings must be made by motion, of which notice must be given to the purchaser, and also to the parties in the cause: (2 Turn. Pract. 649, 650.) If the court approves of the application, an order for opening the biddings will then be made, at the cost of the party making the application, who, in addition to this, must also defray the expenses of the first purchaser, as also such interest on his purchase-money, at four per cent. as shall in the interim be shown to have been unproductive, and also the costs of paying in his own deposit of ten per cent. which the court will never dispense with (*Anon.* 3 Mad. Rep. 494; *Anon.* 6 Ves. 513, 518; 2 Mad. Pract. 502; 1 Turn. Pract. 131), although he will of course be entitled to a return of the latter in case another person should become the purchaser of the property

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(*Rigby* v. *M'Namara*, 6 Ves. 466; *Macclesfield* v. *Blake*, 8 *ib.* 214; *Trefusis* v. *Clinton*, 1 Ves. & B. 361); but he will not be entitled to any allowance for any other incidental expenses he may incur, as these will be considered in the nature of a premium given for the opportunity of bidding. The latter rule, however, admits of some exceptions, and instances have occurred in which a party opening the biddings has been allowed his out-of-pocket expenses; as where a disinterested person comes forward for the benefit of the family, when, by some mistake, the property has been knocked down at a sum far below its actual value, in order to protect the interests of third persons, and not merely with a view of aiding any private speculation of his own: (*Owen* v. *Foulkes*, 9 Ves. 348; *West* v. *Vincent*, 12 *ib.* 6; see also 2 Mad. Pract. 502, 2nd edit.)

Purchaser cannot substitute another in his place without leave of the court.

Where a purchaser has agreed to buy an estate at a sale under a decree, he cannot substitute another purchaser in his place without the previous leave of the court, which will only be granted on the terms of the sub-purchaser paying the purchase-money into court, accompanied by an affidavit that there has been no under-bargain: (*Rigby* v. *M'Namara*, 6 Ves. 515; *Dale* v. *Davenport*, *ib.* 615; 2 Mad. Pract. 498, 2nd edit.)

When it is considered that the property, or any portion of it, may be disposed of more advantageously by private contract, an application should be made to the court upon motion, of which notice must be given and served on the clerk in court of all the parties in the cause; which order, when drawn up, empowers the Master to approve of the contract, and settle any conveyance made in pursuance of it, in case the parties should chance to differ at all about the matter: (2 Smith's Pract. 217, 2nd edit.)

## SECTION IV.

### SALES BY PRIVATE CONTRACT.



1. *Operation of the Statute of Frauds upon Contracts relating to the Sale of Real Property—Interests within the First and Second Sections—Interests within the Third Section—Interests within the Fourth Section—As to the Admissibility of Parol Evidence to explain a written Agreement—What will amount to a valid Signature.*
2. *Practical Remarks upon framing Agreements.*
3. *Observations on the Stamp Acts relative to Agreements.*

#### 1. *Operation of the Statute of Frauds upon Contracts relating to the Sale of Real Property.*

Terms of the agreement should be explicitly set forth.

AN agreement for the sale of real property should be framed with great accuracy; the terms of it should be clearly and explicitly set forth; every care should be taken to avoid equivocal expressions, and nothing which it is intended to carry into effect should be left resting merely on parol, as extrinsic evidence is inadmissible in a court of law to explain the terms of a written contract, and it is only under peculiar circumstances, as will be pointed out hereafter, that such evidence will be received in a court of equity. Even before the Statute of Frauds (29 Car. 2, c. 3), courts of equity were exceedingly cautious of enforcing the specific perform-

ance of parol agreements (*Foot* v. *Salway*, 2 Cha. Cas. 142; and see *Parteriche* v. *Powlett*, 2 Atk. 384; *Preston* v. *Merceau*, 2 Black. Rep. 1249; *Davis* v. *Symonds*, 1 Cox, 402; *Lawson* v. *Lande*, 1 Dick. 346; *Goss* v. *Nugent* (*Lord*), 2 Nev. & Man. 33); although it was said they would sometimes give the party satisfaction for the loss he had sustained (Fonbl. Eq. lib. 1, c. 2, s. 8), but even this was rarely done. The only case, indeed, in which such an order seems to have been made was in *Denton* v. *Stewart* (1 Cox, 258), where it was referred to the Master to inquire what damages the plaintiff had sustained by the defendant having put it out of his power to perform the agreement: (*Greenaway* v. *Adams*, 12 Ves. 395; Fonbl. Eq. 177, n. *b*.) The usual decree seems to have been either for a specific performance, or a *quantum damnificatus*. But for many years past the Statute of Frauds (29 Car. 2, c. 3) has required all agreements relating to the sale of landed property to be in writing, and to be signed by the party to be bound by it, or his lawfully authorized agent (sect. 4); and by more recent enactments (55 Geo. 3, c. 184), no written contracts can be received in evidence unless the proper stamps thereby imposed are affixed to them.

Agreements within the first and second sections.

By the first section of the Statute of Frauds, all leases, estates, interests of freehold, or terms of years, or any uncertain interests of, into, or out of any messuages, lands, tenements, or hereditaments, made or created by livery of seisin only, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of estates at will only.

As to construction of the words "estates at will only."

Notwithstanding the express words of the statute, "*shall have the effect of estates at will only*," still, the great inconveniences attendant

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on that uncertain tenancy caused the courts to construe every tenancy, where no precise term was created, into a tenancy from year to year, if they could discover any reasonable foundation for it; as if the lessor accepted yearly rent, or rent measured by an aliquot part of a year: (*Roe dem. Brown* v. *Wilkinson*, Harg. & Butl. Co. L. H. 720; *Roe dem. Henderson* v. *Charnock*, Peake, N. P. C. 4, 5; see also Selw. N. P. 710, 9th edit.) So that it seems that a lease, void under the section of the statute, by professing to pass an interest for a longer period than three years, may yet be effectual as a lease from year to year; in which case one party cannot determine the tenancy without giving a reasonable notice to quit to the other party, *i.e.*, a half year's notice, expiring with the year of the tenancy: (13 Hen. 8, 15, 6; *Doe dem. Rigge* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; *Thomas* v. *Cook*, 2 B. & A. 119.) A mere permissive occupation will, however, be insufficient to raise the presumption of a tenancy from year to year: (*Richardson* v. *Langridge*, 11 Taunt. 128; *Doe dem. Hall* v. *Wood*, 6 L. T. 102.) Still, for all this, and notwithstanding the courts may be very desirous to presume a tenancy from year to year, where the parties do not expressly state a tenancy at will, it will be otherwise where a tenancy at will is expressly stated. Hence, where by a clause in a mortgage deed the mortgagor agreed to become tenant to the mortgagees, "henceforth *during their will and pleasure*," at and after the rate of 25*l.* 4*s.* a-year, payable quarterly, it was held that this agreement created a tenancy at will only; Denman, C. J., observing, that no case had gone the length of saying that the presumption is to override the express agreement of the parties: (*Doe dem. Bastow* v. *Cox*, 10 L. T. 132.)

Exceptions within

The second section of the statute excepts all

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second section.

leases not exceeding three years from the making thereof, *whereupon the rent reserved to the landlord shall amount to two-thirds of the improved value.*

*Interests within First and Second Sections.*

It seems that, collecting the meaning of the first section from the language of the second, and the exception therein contained, by the leases, &c., meant to be vacated by the first section, must be understood leases of the like kind with those in the second section, but which conveyed a larger interest to the party than for a term of three years, and such as were made *upon a rent reserved thereupon*, and not to those leases where, instead of an annual render, the consideration is a certain specified sum. Hence in *Crosby* v. *Wadsworth* (6 East, 602), it was holden, that an agreement by word of mouth for the purchase of a standing crop of mowing grass then growing on the close of the defendant, *for a certain specified sum*, was not a lease, estate, interest of freehold, or term of years, or uncertain interest in lands created by parol, within the meaning of the first section, so as to be void on the ground of its not having been in writing; yet, at the same time, as it conferred an exclusive right to the vesture of the land for a limited time, and for a given purpose, it was considered as falling within the range of the fourth section, which precludes persons from bringing actions to enforce a contract affecting real property, when such contract is only by parol.

Licence not within the statute, when.

A mere licence, it has been holden, is not within the statute, and this construction has been extended to some cases where the licence conferred an exclusive right to the soil. Thus in *Wood* v. *Lake* (Say. 3), the defendant had agreed

by parol that the plaintiff should have the liberty of stacking coals upon a part of a close belonging to the defendant for the term of seven years, and that during that term the plaintiff should have *the sole use* of that part of the close. After the plaintiff had enjoyed the liberty, in pursuance of this agreement, for three years, the defendant locked up the gate of the close, and thus excluded the plaintiff. The question was, whether the agreement was good for the seven years; when, after consideration, it was holden that this agreement, though by parol, was yet good for the seven years. And, in an earlier case, which was alluded to in *Wood* v. *Lake* (*Webb* v. *Paternoster*, Palm. 71), it was laid down that the grant of a licence to stack hay upon land did not amount to a lease of the land. The authority both of *Wood* v. *Lake* and *Webb* v. *Paternoster* was, however, very much questioned in a recent case, in which the doctrine of parol licences underwent considerable discussion (*Hewlins* v. *Shipman*, 5 B. & C. 233); and it was then remarked, that although in *Webb* v. *Paternoster* the validity of a parol licence to stack hay seemed to have been recognized, yet that the judgment in that case was nevertheless against the licencee; added to which, that case must have been wholly independent of the Statute of Frauds, having been decided before that act was in existence. But *Wood* v. *Lake*, which was determined after the passing of the act, seems to fall within the express terms of it, as there the licence purported to confer the exclusive enjoyment of the lands for a term of seven years. And even supposing, as was contended, that the enjoyment conferred but a mere easement arising out of the land, yet it must even then have been an easement of such a nature as a parol agreement was incapable of creating; for a right of this kind lies in grant, and can, therefore, only be created

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by deed: (*Blanchard* v. *Bridges*, 4 Ad. & El. 176; see also Shep. Touch. 231; Roll. Abr. 62; Gib. Ev. 96, 6th edit.; *Bolton* v. *Carlisle* (*Bishop of*), 2 H. Bl. 259; *Monck* v. *Butler*, Cro. Jac. 574; *Rumsey* v. *Rawson*, 1 Ventr. 18, 25.) And upon the same principle, the right to a water-course or other drain through the land of another has been determined to be an uncertain interest in lands within the Statute of Frauds, and if attempted to be granted by parol, nothing but a mere right at will can possibly pass by it: (*Hewlins* v. *Shipman*, 5 B. & C. 233; *Fentiman* v. *Smith*, 4 East, 107.) But still such a licence, though invalid in itself, is so far effectual that, until it be countermanded, it will operate as an excuse for what would otherwise be deemed an act of trespass, by exercising such a right over the property in question: (*Winter* v. *Brockwell*, 8 East, 308; *Carrington* v. *Roots*, 2 Mees. & Wels. 247.)

Exception as to leases.

The exception contained in the second section with respect to leases, enacts, that they are not to exceed three years *from the making:* and therefore a parol lease for three years, to commence on a future day, is void: (*Anon.* 12 Mod. 610; *Baker & Nelson* v. *Reynolds*, B. R. E. 1785, from Mr. Balguy's note, Serj. Hill's MSS., vol. 21, p. 167; see also Selw. N. P. 844, 9th edit.) But a parol lease for a year and a half, to commence after the expiration of a lease which wants a year of expiring, is good; because it does not then exceed three years from the making: (*Riley* v. *Hicks*, Bull. N. P. 173, 1 Str. 651.) So a verbal agreement to take furnished lodgings for two or three years, was held valid as a lease within the exception contained in the second section, as it did not exceed three years from the making; yet being a contract for an interest in land within the fourth section, it was also held that no action could be maintained for

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not entering upon and occupying the premises: (*Inman* v. *Stamp*, 1 Stark. N. P. C. 12; *Edge* v. *Strafford*, 1 Cro. & Jerv. 391, Tyrw.) But an agreement entered into between landlord and tenant after a regular lease has been granted that the former shall lay out money in improvements, in consideration of which the latter agrees to pay an additional sum per annum; such an agreement is considered as collateral to the lease; and it is also considered that the additional sum to be paid is not rent, but simple matter of personal contract, and such as will support an action, though no written agreement was ever entered into respecting it. (*Hoby* v. *Roebuck*, 7 Taunt. 157; (*Donellan* v. *Read*, 3 B. & Ad. 899.)

Agreement to lay out money in improvement, not considered as rent, when.

*Interests within the Third Section.*

By the third section of the statute of frauds it is enacted, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest (not being copyhold or customary interest), into or out of any real estate, shall be assigned, granted, or surrendered, unless by deed or note in writing, signed by the party so assigning, &c., or their agents thereunto lawfully authorized *by writing*,* or by act or operation of law.

Leases not to be surrendered by parol.

Under this clause of the statute, therefore, the mere act of cancelling a lease will not operate as a surrender; such being neither a deed or note in writing. Nor is it a surrender by operation of law: (*Roe dem. Berkeley* v. *Archbishop of York*, 6 East, 86; *Doe dem. Courtail* v. *Thomas*, 9 B. & C. 288.) And even a parol tenancy from year to year cannot by mutual consent be surrendered by mere word of mouth. (*Botting* v. *Martin*, 1 Camp. N. P. C. 118; *Mollett* v. *Brayne*, 2 *ib.* 103; *Stow* v. *Whiting*,

Mere fact of cancelling a lease will not affect a surrender.

* It is not necessary, under the 4th section, that the agent should be appointed by writing (See *infra*, p. 75.)

2 Stark. N. P. C. 235; *Mathews* v. *Sawell*, 8 Taunt. 270; *Phipps* v. *Sculthorpe*, 1 B. & A. 50; *Thomas* v. *Cooke*, 2 *ib.* 119; see also Selw. N. P. 1421, 9th edit.) Still it was not requisite that the surrender, though it must have been by writing, should have been made by deed. A mere note or memorandum in writing would have been sufficient for that purpose; yet, under the requisitions of the Stamp Act (55 Geo. 3, c. 184), such memorandum could not have been given in evidence unless stamped. A memorandum or agreement to assign or grant a leasehold interest, although void at law under the Statute of Frauds, will still, if founded on a sufficient consideration, be recognized as an agreement in a court of equity, and a specific performance of it decreed in the same manner as an agreement for the sale of any other disposable interest in real property. And although the recent act, 8 & 9 Vict. c. 106, s. 3, declares that all assignments and surrenders of common-law interests (except such as might have been created without writing) shall be void *at law* unless made by deed, yet it seems a court of equity will still recognize an agreement to assign or surrender, although not under seal; for as the statute of Victoria excepts the surrender of such interests as might have been created without writing, such a surrender of a parol lease as would be holden valid within the exception in the second section of the Statute of Frauds, may still be made by a mere note or memorandum in writing; but where the lease confers a larger extent of interest or surrender, it can only be effected by deed.

Mere note or memorandum formerly sufficient to make a surrender.

Surrender not valid at law unless made by deed; but equity will support an agreement to that effect.

Copyholds and customary estates are expressly excepted, both by the third section of the Statute of Frauds, as also by the third section of the 8 & 9 Vict. c. 106; consequently, the surrenders of estates of this description are governed solely by the customs of the several manors to which they respectively appertain.

Copyholds excepted by Statute of Frauds, and stat. 8 & 9 Vict. c. 106.

*Sales by private contract.*

### *Interests within the Fourth Section.*

The fourth section of the Statute of Frauds disables persons *from bringing any action* to charge any person upon any agreement made upon any contract of sale of real estate, or any interest therein, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

No action to be brought on an unwritten agreement respecting lands.

This clause of the statute does not require the agent to be authorized by writing, which, as we have already seen, is expressly required by the preceding sections, *ante*, p. 73; a parol authority is therefore sufficient. (*Rucker* v. *Cammeyer*, 1 Esp. N. P. C. 106; see also *Emerson* v. *Heelis*, 2 Taunt. 46; *Maclean* v. *Dunn*, 4 Bing. 722; *Gosbell* v. *Archer*, 2 Ad. & Ell. 500.)

Agent need not be authorized by writing.

An agreement which confers the vesture of the land for a limited time, and for a given purpose, is an interest in lands within this section of the statute. Hence in the before-cited case of *Crosby* v. *Wadsworth* (6 East, 602), although the parol agreement for the purchase of a standing crop of mowing grass *then growing* was determined to be no interest in lands within the first section of this statute, it was still considered to be such a contract as fell within the express terms of the fourth. In *Bristow* v. *Waddington* (2 Bos. & Pull. 452), also, the sale of the next year's growth of hops was so considered, as was also a contract for the sale of a growing crop of turnips in the case of *Emerson* v. *Heelis* (2 Taunt. 38). The correctness of the latter decision has, however, been much questioned, and, as will very shortly be shown, has been clearly overruled by more recent decisions: (*Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 Mau. & Selw. 205; *Evans* v. *Ro-*

Agreement concerning vesture of lands within 4th section.

Growing crops.

*berts*, 3 B. & C. 829; *Dunne* v. *Ferguson*, 1 Hayes, 541.) The ground upon which Mansfield, C. J. seems to have founded his opinion in *Emerson* v. *Heelis* as to the contract giving the purchaser an interest in the land, was, that the case could not be distinguished from that of *Bristow* v. *Waddington*, where the subject-matter, as we have already seen, was the next year's growth of hops. But the cases are easily distinguishable. In *Bristow* v. *Waddington*, the subject-matter of the sale, viz. the hops, were not in existence at the time the contract was entered into, whereas in *Emerson* v. *Heelis* the turnips were actually existing chattels, and which, though not severed from the freehold, would, as such chattels, have gone as emblement to personal representatives, or might have been sold by the sheriff under a *fieri facias*, which the hops, or rather the roots from which they were to grow, and which was all that existed of them at the time of sale, clearly could not. In *Parker* v. *Staniland*, also (11 East, 362), a contract for the sale of a close of potatoes, then in the ground, at so much a sack, to be taken away immediately, was holden not to be within this section of the statute; and Lord Ellenborough, C. J., observed, that the liberty which the defendant had of entering the close for the purpose of taking away the crop amounted to an easement and no more; and that this case differed materially from that of *Crosby* v. *Wadsworth* (*sup.*), for that, in the latter case, the subject-matter of contract was the *prima vestura*, for which ejectment, as also trespass *quare clausum fregit* lies, but which could not be brought by this defendant for a trespass on the close on which the turnips grew. "It did not," he said, "follow that because the crop of potatoes was not at the time a chattel, it was, therefore, an interest in land." Bayley, J. also

Bristow *v.* Waddington, Emerson *v.* Heelis, and Crosby *v.* Wadsworth considered.

said, it was a contract for a thing whose growth was at an end, and in this case distinguishable from *Bristow* v. *Waddington*, which was a contract for the next year's crop of hops; that he considered the land merely as a warehouse, and that the contract was substantially the same thing as if the potatoes had been deposited in the warehouse at the time of the sale. Again, in *Warwick* v. *Bruce* (2 Mau. & Selw. 205), the defendant agreed to sell to the plaintiff all the potatoes growing on three acres, at the rate of 25*l.* per acre, to be dug and carried away by the purchaser. Lord Ellenborough, C. J., said, that if this had been a contract conferring the exclusive right to the land for a time for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then unquestionably fall within the range of *Crosby* v. *Wadsworth;* but here is a contract for the sale of potatoes at so much per acre. The potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in the field or in a box, still it was the sale of a mere chattel. And in the still more recent case of *Evans* v. *Roberts* (5 B. & C. 829), a verbal agreement for the sale of a then growing crop of potatoes was holden not to be a contract or sale concerning lands within the 4th section of the statute, but that it was a sale of goods within the 17th section, though not to the amount which rendered a note or written memorandum necessary. And in the same case Littledale, J., said, that "the sale of a produce of land, whether it be in a state of maturity or not, *provided it be in actual existence at the time of the contract*, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the 4th section of the Statute of Frauds." And upon this principle it has been

Warwick *v.* Bruce.

Evans *v.* Roberts.

since determined that the sale of a crop of turnips recently sown is not within the meaning of this section of the statute (*Dunne* v. *Ferguson*, 1 Hayes, 541); so that the case of *Emerson* v. *Heelis*, as far as the sale of the crop of turnips is concerned, may be considered as completely overruled. Indeed, in *Evans* v. *Roberts*, above referred to, and in which *Emerson* v. *Heelis* was cited, Bayley, J., admitted that the opinion delivered by Mansfield, C. J. in the latter case was certainly at variance with the opinion of the court in the case then under consideration. Upon the whole, therefore, it may be laid down as a general rule, that the sale of such produce as descends with the land out of which it arises to the heir, is an interest in lands within the 4th section of the Statute of Frauds; whilst the sale of such produce as is in nature of emblements, and as such would be transmissible to the personal representatives, is not; and that this is the proper criterion by which the question is to be tried. Thus, growing grass, timber, coppice, and the produce of fruit trees, as apples or the like, as also such fixtures as may not be removed by the tenant, and which descend with the lands to the heir, are all interests in land within the 4th section of the statute (*Scorell* v. *Boxall*, 1 Y. & J. 396); but such things as are *fructus industrialis*, as potatoes or turnips in the ground, growing crops of corn (*Mayfield* v. *Wadsley*, 3 B. & C. 357; S. C. 5 Dowl. & Ry. 224); or fixtures of that kind which may be removed by the tenant (*Hallen* v. *Runder*, 1 Cr. M. & R. 266), do not fall within its operation—(see *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Ward*, Ambl. 113; *Harvey* v. *Harvey*, Str. 1141; *Elwes* v. *Shaw*, 3 East, 53; *Spencer's* case, Winch, 5; Harg. Co. Lit. 556, n. (2); *Cox* v. *Godsalve*, 6 East, 604, n.; *West* v. *Moor*, 8 East, 339; *Smith* v. *Surman*, 9 B. & C. 577;

What kinds of annual produce are within the statute, and what are not; and how distinguishable.

*Watts* v. *Friend*, 10 *ib.* 446; *Price* v. *Leyburn*, Gow. 109; *Janisbury* v. *Matthews*, 4 Mees. & Wels. 343; *Jones* v. *Flint*, 2 Per. & Dav. 594); —although they come clearly within the range of the 17th section; and, therefore, where the price is above 10*l.* the contract cannot be enforced unless the buyer accepts some part of the goods, or gives something in earnest to bind the bargain, or there is some note or memorandum in writing signed by the party or his lawfully authorized agent: (*Egerton* v. *Mathews*, 6 East, 307; *Coleman* v. *Gibson*, 1 Mood. & Rob. 168; *Hoadley* v. *M'Laine*, 10 Bing. 482; *Howe* v. *Palmer*, recognized in *Hanson* v. *Armitage*, 5 B. & A. 557; see also *Searle* v. *Keaves*, 2 Esp. N. P. C. 598; *Chaplin* v. *Rogers*, 1 East, 192; *Elmore* v. *Stone*, 1 Taunt. 158; *Bentall* v. *Burn*, 3 B. & C. 423; 1 Ry. & Man. 107.) Railway shares are not an interest within the 4th section of the Statute of Frauds: (*Bradley* v. *Holdsworth*, 3 Mee. & Wels. 144.) But the law is otherwise with respect to shares in a mining company, which are transferable without the consent of the other partners, which are clearly interests within the 4th section of the statute (*Boyce* v. *Green*, Batt. 608); as is also the right of drawing water from a well (*Tyler* v. *Bennett*, 6 Nev. & M. 826.)

Sale of railway shares not within the 4th section of the Statute of Frauds.

*Aliter* as to mining shares.

Also, of a right to draw water from a well.

But notwithstanding a verbal agreement for the sale of things annexed to the freehold is invalid within the 4th section of the Statute of Frauds as long as they remain fixed there, yet the moment they are severed they become mere chattels, when the 4th section is no longer applicable to them; so that if the purchase-money to be paid for them does not exceed 10*l.* a contract for the sale of them will be perfectly valid, although only verbally entered into.

Fixtures when severed not within statute.

It will be proper, also, to remark, that although a party is precluded from bringing any action in

Agreement executed how far binding.

Contract, if executed, cannot be treated as a nullity.

the case of a parol agreement concerning an interest in lands within the 4th section of the Statute of Frauds, still this does not wholly vacate the contract, which, if executed, the parties cannot treat as a nullity: *Poulter* v. *Killingbeck* (1 Bos. & Pull. 397) is a case of this description. There the plaintiff agreed by parol to let land to the defendant, for which he was to take successive crops, and to render to the plaintiff a moiety of the crops in lieu of rent. Whilst the crops of the second year were in the ground, the value of them was ascertained by appraisement, which was taken of them by both parties. The defendant having afterwards refused to pay a moiety of the value, the plaintiff brought his action. On a case reserved, it was objected that this agreement was within the statute, because it related to land; but the court overruled the objection; Eyre, C. J., observing, that the circumstances of the appraisement seemed to put an end to this point. It was true that, as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under the special agreement, but that special agreement was executed by the appraisement—the circumstance of the appraisement afforded clear proof that the plaintiff sold what the defendant agreed was his; and the price having been ascertained, brought this to the case of an action for goods sold and delivered. Lord Ellenborough, C. J., also, when commenting upon this case (6 East, 612), observed, "that the contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so. It was originally an agreement to render what should have become a chattel; that is to say, part of the severed crop in that shape in lieu of rent, and by a subsequent agreement it was changed into money, instead of remaining a specific render of

produce. Still, notwithstanding that the contract is not in itself wholly void on account of its being merely by parol, so that if carried into effect the parties cannot treat it as a nullity, yet, as long as it remains executory, it may be discharged by parol before anything is done which can be construed as a part performance of it." (*Crosby* v. *Wadsworth*, 6 East, 602.)

Contract whilst executory may be discharged by parol.

As courts of law will not permit an action to be brought upon a parol agreement for the purchase of real estate or any interest therein, within the meaning of the 4th section of the Statute of Frauds, so courts of equity, following the law, will not, as a general rule, entertain a bill for a specific performance of a contract of a like nature. The only exceptions to this rule seem to be; first, in the case of sales before a Master in pursuance of a decree, which, being a judicial sale, takes it entirely out of the statute (*Attorney-General* v. *Day*, 1 Ves. 218); secondly, where the party, by his answer, confesses the agreement, and submits to perform it; and, thirdly, where there has been a part performance of such agreement.

Courts of equity will not support parol agreement unless under special circumstances.

Sales before the Master in Chancery not within the statute.

The confession of the agreement by the defendant in his answer seems to have been considered by courts of equity as not falling within the mischiefs it was the object of the statute of 29 Car. 2, c. 3, to prevent, viz., frauds and perjuries; and, consequently, where there was a confession of this kind, a specific performance has been decreed accordingly: (*Spurrier* v. *Fitzgerald*, 6 Ves. 548; see also *Croyston* v. *Banes*, Pre. Cha. 208; 1 Eq. Ca. Abr. 19, S. C.; *Daniel* v. *Davidson*, 16 Ves. 249.) But whether this would, or ought to be done where a defendant, though he confesses the agreement, insists upon the statute as a protection against being compelled to perform it, is a question by no means satisfactorily determined. In *Child* v. *Godolphin*

Agreement confessed will take case out of the statute.

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(1 Dick. Rep. 39; cited 2 Bro. C. C. 566), Lord Macclesfield is said to have held that the defendant was bound by his answer either to confess or to deny the agreement (see also 6 Bro. P. C. 45; 1 Bro. C. C. 404); from whence, as a necessary consequence, it would seem to follow, that if he confessed it, he should not be allowed to avail himself of the statute. But this doctrine seems to have been overruled by the more recent decisions (*Cooth* v. *Jackson*, 6 Ves. 39; *Blagden* v. *Bradbear*, 12 *ib.* 466; *Rowe* v. *Teed*, 14 *ib.* 375; see also *Walters* v. *Morgan*, cited; 1 Mad. Pract. 383, 2nd edit.; Redes Tr. Pl. 217, 3rd edit.); nor does there appear to be one single instance in which a performance in specie has been decreed against a defendant who has availed himself of the protection of the statute as his defence against the specific performance of an unwritten agreement, which he may do either by plea, or answer (*Whitchurch* v. *Bevis*, 2 Bro. C. C. 567; *Whaley* v. *Bagenal*, 5 Bro. P. C. 45; *Cooth* v *Jackson*, 6 Ves. 39; *Blagden* v. *Bradbear*, 12 Ves. 241; *Walters* v. *Morgan*, 2 Cox, 369; *Clark* v. *Grant*, 14 Ves. 519; Fonbl. Eq. 182, n. (*d*)); the statute not having prescribed any mode in particular by which a defendant must avail himself of this mode of defence. At the same time, it seems that if a defendant admits the agreement and fails to insist upon the statute, he will be taken to have renounced his intention of availing himself of its protection (2 Cha. Cas. 136, 143, 164; Nels. 346; God. 437; *Attorney-General* v. *Day*, 1 Ves. 220; *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 416; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559; *Moore* v. *Edwards*, 4 Ves. 24); nor will he be allowed to set up the statute in his answer to an amended bill (*Spurrier* v. *Fitzgerald*, 6 Ves. 548); and therefore, whether he submits to perform the agreement or not, if he confesses it

without resorting to the statute, a specific performance would nevertheless be decreed against him. (*Skinner* v. *M'Douall*, 11 Law T. 411; *Kennedy* v. *Lee*, 3 Mer. 441; *Ogilvie* v. *Foljambe*, *ib.* 53.)

Part performance will take case out of statute.

In the case of a part performance, the evidence of the bargain does not rest merely upon the words, but upon deeds actually done. Cases of this description are purely matters of equitable jurisdiction, which was assumed very shortly after the passing of the Statute of Frauds: (*Foxcraft* v. *Lyster*, cited 2 Vern. 456; *Gunter* v. *Halsey*, Amb. 586; 1 Mad. Pract. 377, 2nd edit.) In one case, indeed, the Court of King's Bench seems to have considered that a contract partly performed was totally out of the statute at law as well as in equity; and Mr. Justice Buller expressed the same opinion on one or two equity cases which came before him (see *Brodie* v. *St. Paul*, 1 Ves. 333); but it seems that he afterwards abandoned so untenable a doctrine. (*Cooth* v. *Jackson*, 6 Ves. 39; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; 1 Mad. Pract. 337, 2nd edit.)

What acts will be construed to amount to part performance.

As to what will constitute an act of part performance, it appears that if a purchaser on a verbal agreement for the purchase of landed property is let into possession of it by the vendor (*Butcher* v. *Stapeley*, 1 Vern. 363; *Pyke* v. *Williams*, 2 *ib.* 455; *Lockey* v. *Lockey*, Pre. Cha. 518; *Aylesford's* (*Earl of*) *case*, 2 Str. 783; *Binstead* v. *Coleman*, Bunb. 65; *Barrett* v. *Gomersera*, *ib.* 94; *Lacon* v. *Mertins*, 3 Atk. 1; *Wills* v. *Stradling*, 3 Ves. 378; *Bowes* v. *Cator*, 4 *ib.* 31; *Denton* v. *Stewart*, cited 1 Fonbl. Eq. 187, n. (*d*); *Gregory* v. *Mighell*, 18 Ves. 328; *Kine* v. *Balfe*, 2 Ball & B. 343; *Morphett* v. *Jones*, 1 Swanst. 172), it will amount to a part performance; and still more so if the party so let into possession with this knowledge afterwards

lays out money in building or otherwise improving the estate: (*Foxcraft* v. *Lyster*, 2 Vern. 456, n.; *Floyd* v. *Buckland*, 2 Freem. 268; *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Boardman* v. *Mostyn*, 6 Ves. 470; *Bond* v. *Hopkins*, 1 Sch. & Lef. 433; *Morphett* v. *Jones*, 1 Swanst. 171; 1 Mad. Pract. 381, 2nd edit.) But a mere act of entry, without the permission or privity of the vendor, will amount to nothing; neither will a continuance in possession by a tenant after his tenancy has expired (*Cole* v. *White*, 1 Bro. C. C. 409, cited), unless the landlord were afterwards to accept additional rent; in which case the latter would be bound to answer whether such rent was accepted as a holding from year to year, or upon what other terms: (*Wills* v. *Stradling*, 3 Ves. 373; *Frame* v. *Dawson*, 14 *ib.* 386.) In order also to support an agreement by part performance, the terms of the agreement must be shown, otherwise it will be impossible to carry it into effect (*Mortimer* v. *Orchard*, 2 Ves. 243; *Anon.*, cited by Lord Eldon, 6 Ves. 470; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Sewage* v. *Carroll*, Ball & B. 265; *Reynolds* v. *Wasing*, 1 You. 346); all the assistance that a court of equity can render in such a case is to direct that the money laid out shall be repaid. Mere expenditure of money, however great in amount, can afford no criterion of the duration of interest contemplated by the parties, where the agreement itself is altogether silent upon that head (*Wheeler* v. *D'Esterre*, 2 Dow. 360); neither can possession afford any evidence either of the price agreed upon, or of the quantity of interest intended to pass: (*Attorney-General* v. *Day*, 1 Ves. 221; *Wills* v. *Stradling*, 3 Ves. 382.) In *Foster* v. *Hale* (3 Ves. 712), Lord Alvanley also expressed an opinion that the court had gone too far in permitting part performance and other circumstances to take a case out of the statute; and

Mere act of entry without privity of vendor will not constitute a part performance.

In order to constitute part of performance it is requisite to show the terms of the agreement.

Lord Eldon (*Cooth* v. *Jackson*, 6 Ves. 32; 1 Mad. Pract. 379), as also Lord Redesdale (2 Sch. & Lef. 5; see also *Toole* v. *Medlicot*, 1 Ball & B. 404), whenever a question of this nature arose out of any case that came before either of them, expressed a firm determination not to go one iota further than the cases had previously gone; which the former observed (16 Ves. 32) had already gone so far as nearly to repeal the Statute of Frauds.

To constitute part performance, the act must be done with no other design.

The act to constitute a part performance must also be such as could be done with no other design than to perform the agreement. Entering into mere preliminary matters, such as delivering abstracts, or a draught of the conveyance, or employing surveyors to look over and value the property, will be insufficient; such acts being considered as merely introductory or ancillary to the agreement, and not a part performance of it: (*Clerk* v. *Wright*, 1 Atk. 12; *Cook* v. *Tombs*, Anstr. 480; *Whaley* v. *Bagenal*, 6 Bro. P. C. 645; *Lacon* v. *Mertins*, 3 Atk. 4; *Cole* v. *White*, before Lord Camden in 1767, cited 1 Bro. C. C. 109; *Whitbread* v. *Brockhurst*, *ib.* 403, 412; *Robertson* v. *St. John*, 2 Bro. C. C. 140; *Whitchurch* v. *Bevis*, *ib.* 559; *Reding* v. *Wilks*, 3 *ib.* 420; see also 1 Mad. Pract. 378, 2nd edit.; 1 Fonbl. Eq. 187, n. (*d*).)

Whether payment of part of purchase money will constitute a part performance.

Whether the payment of money will amount to a part performance or not, is a question on which the cases are exceedingly contradictory (*Pengall* (*Lord*) v. *Ross*, 1 Eq. Ca. Abr. 46; *Leake* v. *Morris*, 2 Cha. Cas. 135; *Seagood* v. *Meale*, Pre. Cha. 560; 1 Eq. Ca. Abr. 560, S. C.; *Ex parte Hooper*, *In re Hewett*, 1 Mer. 9; *Butcher* v. *Butcher*, 9 Ves. 382; *Clinan* v. *Cook*, 1 Sch. & Lef. 22; and see 1 Fonbl. Eq. 187, n. (*d*)); but the better opinion seems to be that it will not. That the payment of the whole auction duty by the purchaser, or a sum of money by way of earnest, would have

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been insufficient, has been long since determined (*Pengall* (*Lord*) v. *Ross*, *sup.*; *Leake* v. *Morris*, *sup.*; *Seagood* v. *Meale*, *sup.*; *Buckmaster* v. *Harrop*, 7 Ves. 341; 14 *ib.* 456); as it has also where a small proportion only of the purchase-money has been paid—a twentieth part, for instance (*Main* v. *Melbourne*, 4 Ves. 720); yet there are cases in which it has been holden that payment of a substantial part of the price will take a case out of the statute, though a trifling payment will not: (*Simon* v. *Cornelius*, 1 Cha. Rep. 241; *Lacon* v. *Mertins*, 3 Atk. 4; see also 1 Mad. Pract. 381, 2nd edit.) But here a great difficulty arises, as to what is to be the limit of amount at which it ceases to be trifling and begins to become substantial—a difficulty so great that it seems rather to raise a question than establish a rule (*Butcher* v. *Butcher*, 9 Ves. 382); and since Lord Redesdale's decision in *Clinan* v. *Cooke* (1 Sch. & Lef. 40), it seems to be settled that the payment of money, however considerable, will in no case be deemed a part performance. "The great reason," Lord Redesdale said, "why payment does not take an agreement affecting lands out of the statute is, that the statute has said, viz., with respect to goods, it shall operate as a part performance; from whence it may reasonably be inferred that when the Legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant it should not bind in the latter instance."

*Agreement executed by part performance binding on representatives.*

But where the acts are such as to amount to a part performance, they will be equally binding on the representatives, as on the party himself who originally entered into the agreement (*Attorney-General* v. *Day*, 1 Ves. sen. 221; *Croyston* v. *Banes*, Pre. Cha. 208; *Wanley* v. *Scowbridge*, 1 Bro. C. C. 414, cited); and instances have occurred in which even a remainder-man has been held bound by a parol contract, entered into

by the tenant for life taking the preceding particular estate; as where such a tenant for life enters into a parol agreement for a lease, upon which the lessee enters into possession and lays out money upon the property, and the remainder-man, after the death of the tenant for life, acquiesces in the lease and allows the lessee to go on expending his money, when he will be as much bound to carry this contract into effect as the tenant for life himself would have been: (*Stiles* v. *Cowper*, 3 Atk. 692; *Blore* v. *Sutton*, 3 Mer. 247; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 72.) Yet, generally speaking, a remainder-man will not be bound by any acts of the tenant for life to which he is not a party; for the reason of a party being bound by a parol agreement is chiefly on the ground of fraud, which, being personal, cannot of course apply to the remainder-man; unless by some act of his own he renders himself a party in some way or other to the transaction. (*Ib. id.*)

### *As to the Admissibility of Parol Evidence to explain a written Agreement.*

Parol evidence in general inadmissible to explain a written agreement.

As a general rule, parol evidence is inadmissible in equity as well as at law: (*Parteriche* v. *Powlett*, 2 Atk. 383; *Preston* v. *Merceau*, 2 Blackst. 1249; *Foot* v. *Salway*, 2 Cha. Ca. 192; *Lawson* v. *Laude*, 1 Dick. 346; *Davis* v. *Symonds*, 1 Cox, 402; *Powell* v. *Edmunds*, 12 East, 6; *Jenkinson* v. *Pepys*, 6 Ves. 330 cited; *Higgenson* v. *Clowes*, 15 *ib.* 516.) Yet where a court of equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, a party is let in to show that the plaintiff is not entitled to have the agreement carried into execution. (*Davis* v. *Symonds*, *sup.*) Under the Statute of Frauds no person can be charged with the execution of an un-

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written agreement where the subject-matter of such agreement relates to the sale or conveyance of real property; still the statute does not say that a written agreement shall in every case be binding on the parties. It merely says that an unwritten agreement shall not be binding: (*Clinan* v. *Cooke*, 1 Sch. & Lef. 39.) Hence, where a bill is brought for the specific performance of a written agreement to purchase real property, parol evidence is admissible on the part of the defendant for the purpose of showing that by fraud the written agreement does not contain the real terms (*Joynes* v. *Statham*, 3 Atk. 388; *Woollam* v. *Hearn*, 7 Ves. 511; *Clarke* v. *Grant*, 14 Ves. 519; and see 15 *ib.* 523); that there are circumstances independent of the writing, making it inequitable to decree a performance in specie; as where there has been a gross misrepresentation (*Cadman* v. *Horner*, 18 Ves. 11; *Lowndes* v. *Lane*, 2 Cox, 363); or a wilful misdescription of the property (*Stewart* v. *Alliston*, 1 Mer. 26); or the agreement is unconscientious (*Vaughan* v. *Thomas*, 1 Bro. C. C. 556); or unreasonable (see 1 Mad. Pract. 405, and the cases there referred to; see also note to *Howell* v. *George*, 1 Mad. Rep. 11; *Revell* v. *Hussey*, 2 Ball & B. 287); or there has been any unfairness attending it (*Savage* v. *Taylor*, For. 234; *Scott* v. *Merray*, 1 Ves. 2); as where undue advantage has been taken of a party when in a state of intoxication (*Cragg* v. *Holme*, mentioned in a note to *Cooke* v. *Clayworth*, 18 Ves. 14; see also 1 Mad. Pract. 303, 2nd edit.; 1 Fonbl. Eq. 67); or fraud of any kind or description whatever has been practised; or there has been any omission or mistake in the agreement (*Jones* v. *Statham*, 3 Atk. 388; *Woollam* v. *Hearn*, 7 Ves. 211; *Mason* v. *Armitage*, 13 *ib.* 25; *Flood* v. *Finlay*, 2 Ball & B. 9; *Howell* v. *George*, 1 Mad. Rep. 11), in all of which cases

Parol evidence admissible for the purpose of showing there are circumstances making it inequitable to decree a specific performance.

extrinsic evidence will be admitted to protect a defendant from being compelled, under such circumstances, to carry the contract into execution. Nor is fraud actually necessary to render parol evidence admissible; for it will be received in opposition to a bill for a specific performance of a written agreement, upon the ground of mistake, or of surprise, as well as of fraud: (*Ramsbottom* v. *Gosden*, 1 Ves. & Bea. 165; *Flood* v. *Finlay*, 2 Ball & B. 9; *Gordon* (*Lord W.*) v. *Hertford* (*Marquis of*,) 2 Mad. 106; *Garrard* v. *Gosling*, 2 Swanst. 244; *Townsend* (*Marquis of*,) v. *Stangroom*, 6 Ves. 328.) But evidence of this kind will not be admitted for the purpose of superadding anything to an agreement, after such agreement has been correctly reduced into writing and signed by the party to be bound by it. Hence, where a party has entered into a written contract, parol evidence for the purpose of showing that it was at the same time agreed, though not contained in any part of the agreement, that the defendant was to be let into possession at a stated period, was rejected; the court considering that the parol could not be embodied in the written contract: (*Omerod* v. *Hardman*, 5 Ves. 722.) Still, although the terms of a written contract can neither be superadded to nor altered, they may nevertheless be discharged *in toto* by parol, and the contract altogether abandoned: (Rob. Stat. of Frauds, 89: *Inge* v. *Leapingwell*, 2 Dick. 469; *Whaley* v. *Bagenal*, 6 Bro. P. C. 45; *Robinson* v. *Page*, 3 Russ. 119.)

Parol evidence inadmissible for the purpose of adding anything to an agreement.

Agreement may be discharged by parol.

*What is a valid Signature within the Statute.*

It is not necessary, in order to constitute a valid agreement within the statute, that the note in writing should be contemporaneous with the agreement. It is sufficient at whatever time made if adopted by the party afterwards, and

What is a valid signature within the statute.

then anything under his hand, stating that he has entered into the agreement, will satisfy the statute, the object of which was to protect persons from having parol agreements imposed on them. (Per Lord Ellenborough, C. J., in *Shippey* v. *Derrison*, 5 Esp. N. P. C. 190.) Thus, an indorsement by the defendant on the draft of a lease on the premises in question, which had been perused and altered by his own attorney in the following terms—"I hereby request Mr. Shippey to endeavour to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for so doing this shall be sufficient authority.—J. DERRISON," was determined to be a valid contract, though it was admitted that at the time when the agreement for a lease was entered into it was not reduced into writing, nor was any memorandum made of it: (*Shippey* v. *Derrison*, *sup.*) But merely altering a draft, though the name of the party be inserted in the body of it, will not take the case out of the statute. Thus in *Ithell* v. *Potter* (cited 1 P. Wms. 771), and in *Hawkins* v. *Holmes* (*ib.* 770), it was determined that the party having altered a draft with his own hand was not a sufficient signature within the statute; and the same point received the opinion of the Court of Exchequer in *Stokes* v. *Moor* (1 Cox, 219). In the case last alluded to, the defendant wrote certain instructions from which the lease was to be prepared, in the following words: "The lease renewed—Mr. Stokes to pay the King's tax; also to pay Moor 24*l.* a year, half-yearly; Mr. Stokes to keep the house in good tenantable repair." It was holden that the name inserted in the body of the instrument, and applicable to particular purposes, could not amount to such an authentication of the instrument as the statute required. It was, however, admitted that where the name is inserted in such

Indorsement by the party of his name on the draft of a lease held to be binding.

Merely altering a draft insufficient to take case out of the statute; although the party's name be inserted in the body of it.

a manner as to have the effect of giving authenticity to the whole instrument, it does not much signify in what part of the instrument it is found; and it has been since determined that if a person write an agreement and begin thus, "A. B. agrees to sell," it is a sufficient signing within the statute, notwithstanding a space may be left for the signature at the bottom of the paper: (*Saunderson* v. *Jackson*, 2 Bos. & Pull. 238; *Knight* v. *Crockford*, 1 Esp. N. P. C. 190; *Allen* v. *Bennett*, 3 Taunt. 169.) It seems also that if a printed signature is done by the party's directions, it will be a signing by the lawfully authorized agent within the meaning of the statute (*Champion* v. *Plummer*, 1 Bos. & Pull. 252, N. C.; *Schneider* v. *Norris*, 2 M. & S. 286); and where a party is in the habit of stamping instead of signing his name, it will be a sufficient signature; as will also a mark made by an illiterate person, or by one who, from bodily weakness or other infirmity is incapable of signing his name. But stamping an instrument with a seal is not a signature within the meaning of the statute: (*Smith* v. *Evans*, 1 Wils. 313; *Grayson* v. *Atkinson*, 2 Ves. 454.) And in every case the signature of the name in some way or other is absolutely requisite. Hence a letter from a mother to her son, addressing him by his christian name, and concluding "your affectionate mother," with the full name and address of the party set forth in the direction, was considered an insufficient signing within the statute.

Printed signature, or by a stamp mark, a sufficient signing within the statute.

Sealing not a sufficient signature.

But a signature by a party as a witness may be a sufficient signature; yet, in order to render it so, it must be shown that he was aware of the nature of the contents of the instrument at the time he signed it; for the act of signing it will of itself afford no proof of that fact; it being so frequent a practice for persons to sign their names as witnesses to agreements or other writ-

Signature by party as a witness valid, when.

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ings without the slightest knowledge of their purport or contents: (*Welford* v. *Beazeley*, 3 Atk. 503; *Harding* v. *Crethorn*, 1 Esp. N. P. C. 58.)

Contract equally binding on the party signing, although unsigned by the other.

A contract is binding on the party signing it, although not signed by the other contracting party. This important point was decided very shortly after the passing of the Statute of Frauds, and thus the law has continued down to the present day: (*Hatton* v. *Gray*, 2 Cha. Cas. 164; *Cotton* v. *Lee*, 2 Bro. C. C. 564, cited; *Backhouse* v. *Crosby*, 2 Eq. Ca. Abr. 32, pl. 44; *Robson* v. *Collins*, 7 Ves. 130; *Seton* v. *Slade*, *ib.* 265; *Fowle* v. *Freeman*, 9 *ib.* 351; *Egerton* v. *Mathews*, 6 East, 307; *Ex parte Minet*, 14 Ves. 286; *Ex parte Gardon*, 15 *ib.* 286; *Bateman* v. *Phillips*, 15 East, 272; *Wain* v. *Warlters*, 5 East, 10; *Huddelston* v. *Briscoe*, 11 Ves. 583; *Western* v. *Russell*, 3 Ves. & B. 187; *Saunders* v. *Wakefield*, 4 B. & A. 595; *Jenkins* v. *Reynolds*, 3 Bro. & Bing. 14; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; see also 1 Fonbl. Eq. 177.)

Signature by agent binding on principal.

The agreement may be entered into by the lawfully authorized agent of the party to be charged, as well as by the party himself; such, as we have already seen, being within the express terms of the Statute of Frauds (see section 4); and an agent within the meaning of the 4th section need not, as previously noticed, (*ante*, p. 75,) be appointed by writing, though this is necessary, by the express words of the statute, to constitute an agent for any of the purposes of the 1st and 3rd sections. The authority of the agent may, however, be revoked by his principal at any time before it is actually carried into execution: (*Emerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Procter*, 4 *ib.* 209; *Farmer* v. *Robinson*, 2 Camp. N. P. C. 339, (n.); *Blaydon* v. *Bradbear*, 12 Ves. 466; *Mason*

Agent within 4th section need not be appointed by writing.

v. *Armitage*, 13 *ib.* 25.) It is also requisite that the agent should be a third person, as neither of the contracting parties can be the agent for the other. (*Wright* v. *Dannah*, 2 Camp. N. P. C. 203.) Nor can an agent on either side bring an action in his own name as the contracting party; hence, though a purchaser is bound by an auctioneer's signature even where he bids by an agent, yet the auctioneer cannot maintain an action in his own name upon this contract: (*Farebrother* v. *Simmons*, 5 B. & A. 333.) And notwithstanding the agent's signature is binding, yet the clerk of such agent has not such a general authority as will enable him to sign so as to bind the principal; though the principal may, if he pleases, confer such a special authority upon him, or it may even be implied by his subsequently acquiescing in his so doing: (*Maclean* v. *Dunn*, 4 Bing. 722; *Coles* v. *Tregothic*, 9 Ves. 234.)

Signature by agent's clerk not generally binding; but principal may confer a special authority for that purpose.

Where an agent is employed to sell property upon commission, the terms of which are, that he shall be entitled to payment upon the conclusion of the treaty, he will not be so entitled until a valid agreement, binding upon both parties, sufficient to satisfy the Statute of Frauds, has been duly entered into. Simply introducing a party to the vendor, and a mere consent by the parties to the terms of the contract, will be insufficient for that purpose. The treaty is not concluded until a complete and binding contract is entered into. (*Cotton* v. *Swann*, 11 Law T. 63.)

Agent employed to sell property not entitled to commission, unless valid agreement is entered into.

No particular form is required to form a valid agreement; hence, a receipt for the purchase-money may constitute a valid agreement within the statute. (*Coles* v. *Tregothic*, 9 Ves. 234; *Blagden* v. *Bradbear*, 12 Ves. 466.) But in whatever form the note is made, it must contain the terms of the agreement, the names of both vendor and purchaser, the description of the property, and the price to be paid for the pur-

What will amount to a valid memorandum, &c.

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chase of it, otherwise it will not be a valid agreement within the statute: (*Seagood* v. *Meale*, 1 Eq. Ca. Abr. 49, pl. 20; Pre. Cha. 560; 1 Str. 246; *Clerk* v. *Wright*, 1 Atk. 12.)

Requisites to constitute a valid agreement.

Thus, in *Seagood* v. *Meale* (1 Eq. Ca. Abr. 49, pl. 20; Pre. Cha. 560; 1 Str. 246), the agreement was held not to be binding because it neither contained the sum to be paid for the purchase, nor the number of houses that were to be sold, nor in fact whether any of them were to be sold at all, nor to whom; and that to admit an agreement of this kind to be a sufficient note or writing within the Statute of Frauds, would be to let in all the danger of perjury it was the express object of the statute to prevent; and in a more recent case already referred to (*Blagden* v. *Bradbear*, 12 Ves. 466) an auctioneer's receipt for the deposit was held not to amount to an agreement, because it did not contain the whole terms; the price to be paid for the estate having been omitted: (*Elmore* v. *Kingscote*, 5 B. & C. 583.) But had such a receipt contained the whole terms of the agreement, or referred to the conditions, it would have been sufficient to have constituted a valid agreement within the meaning of the statute; for, as I have before remarked, it is not requisite that the whole agreement should all be embodied in one entire paper. It may be contained in several distinct writings, which, if they have any reference to each other, will be quite enough (*Shippey* v. *Derrison*, 5 Esp. N. P. C. 190; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; see also *Brodie* v. *St. Paul*, 1 Ves. 326; *Tawney* v. *Crowther*, 3 Bro. C. C. 318); and this, although only one of them be signed (*Cass* v. *Waterhouse*, Pre. Cha. 29); and parol evidence will, in such cases be admitted to point out the different writings referred to: (*Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 1 B. & C. 945.)

Terms of the agreement must be expressed.

The note in writing must also contain the names

Agreement invalid if it does not contain the name of the contracting parties.

of contracting parties. Hence, where in a sale by auction the auctioneer signed the defendant's name upon a bill containing the "particulars of sale," as a purchaser of one of the lots, but neither the particulars nor the conditions of sale contained the name of the plaintiff, the vendor; but about an hour after, before the parties had left the room, the plaintiff's attorney signed the plaintiff's name upon a printed copy of the conditions, as the vendor; it was held, that this was not a valid signature; for that in order to fulfil the requirements of the statute, the memorandum must be such, that, at the time of the signature, it contains a valid contract. It will not do to complete the contract by the introduction of something afterwards; and that in the present case there was no valid contract at the time the defendant signed the memorandum. (*Turnley* v. *Hartley*, 11 Law T. 102.)

Letters construed as an agreement, when.

Where questions of this kind most frequently arise is, where an agreement is sought to be established by means of a correspondence carried on through a series of letters, which, if they contain either in themselves (*Clinan* v. *Cooke*, 1 Sch. & Lef. 22; and see Pre. Cha. 29; *Hinde* v. *Whitehouse*, 7 East, 558; *Feoffees of Herriot's Hospital* v. *Gibson*, 2 Dow. 301; *Powell* v. *Dillon*, 2 Ball & Beat. 416), or by reference to any other writing, the terms of the agreement, will be valid and effectual as such; and this notwithstanding the writer of them may have looked to the execution of a more formal instrument: (1 Mad. Pract. 374; *Fowle* v. *Freeman*, 9 Ves. 351.) Still it is essential that the letters should prove the terms of the contract; for if they prove a contract different from that attempted to be set up, it will be insufficient. They must also import a concluded agreement; for if it should appear from their general tenor that what passed was a simple treaty (*Huddlestone* v. *Biscoe*, 11

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Letters must import a concluded agreement: mere treaty will be insufficient.

Ves. 591; *Holland* v. *Eyre*, 2 Sim. & Stu. 194; *Routledge* v. *Grant*, 4 Bing. 653), however far the transaction may have gone, a specific performance will never be decreed; much less would the court interfere to enforce it where the letters, instead of being a ratification, are written for the purpose of abandoning the contract: (*Gosbel* v. *Archer*, 2 Ad. & Ell. 500.) But if the agreement contains all the requisite terms, and is properly signed, it will not be annulled by being sent in the form of instructions to a solicitor, in order that an agreement may be drawn up from it in a more regular and technical form. And even a letter written by the vendor to any third person containing directions to carry the agreement into execution, provided it contains the whole terms of the agreement, the names of the parties, the description of the property, and the amount of the purchase-money, will be a sufficient agreement to take a case out of the statute: (*Welford* v. *Beazley*, 3 Atk. 503.) Hence in *Smith* v. *Watson* (Bunb. 55,) where upon an agreement for an assignment of a lease, the owner sent a letter to a scrivener, with directions to draw an assignment pursuant to the agreement, the Court of Exchequer held that the letter was a writing within the Statute of Frauds. And it seems the doctrine will apply equally to a letter written by a purchaser as by a vendor. But the delivery of an abstract of title upon a treaty for a sale, although signed by the vendor, and even containing all the particulars of the agreement, will not be construed as such within the meaning of the statute, and the like rule holds with respect to rent rolls and particulars of estates, although they set forth the terms and conditions all in the handwriting of the vendor, and signed by him: (*Whaley* v. *Bagenal*, 6 Bro. P. C. 5; *Cooke* v. *Tombs*, 2 Dustr. 42; *Smith* v. *Watson*, Bunb. 55; *Fowle* v. *Freeman*, 9 Ves. 351.)

Doctrine as to agreements established by a series of letters will apply equally to vendor as to purchaser.

## 2. *Practical Remarks upon framing Agreements.*

How agreements should be penned.

Having thus attempted to point out the essential qualities of an agreement for the sale of landed property, I purpose next to offer some practical remarks upon the manner in which such agreement should be framed; so that it may not only be binding and conclusive on the parties, but, if possible, prevent any questions from arising upon the construction of it at any future time.

Form of an agreement.

The agreement is usually headed as "MEMORANDUM" or "ARTICLES OF AGREEMENT," entered into between the several parties, naming them, for themselves and their respective representatives. It then proceeds to state the agreement on the part of the vendor to sell, and on the part of the vendee to purchase the property, either in fee or for any lesser estate, as the case may be, at a certain price, which is then set forth. These form the essential terms of an agreement, and if signed in pursuance of the Statute of Frauds, will become binding on all those who have done so. Still it is not often advisable to pen an agreement in such general terms as these. The state of the title may, as we have already seen, call for many stipulations and provisions, both as to its commencement as also the evidence by which the subsequent acts and assurances are to be proved, as also by whom certain expenses incidental to the investigation of the title and other matters connected with the sale are to be defrayed. This subject has been already so fully treated upon under the head of "Conditions of Sale," as to render it unnecessary to enter upon the subject again in this place. It remains, however, to remark, that some special stipulations are frequently inserted in agreements, where the property is sold by private contract, which are rarely, if ever, used

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in the ordinary conditions of sale, where the property is sold by auction; amongst which may be mentioned the clauses with respect to the time and manner of the payment of the purchase-money—as, for example, that the whole or some part of the consideration shall be an annuity (see the form in the Precedents, No. III. clause 3); or that some portion of the purchase-money of it shall remain upon mortgage of the premises. (See the form in the Precedents, No. III. clause 4.) Sometimes also it is arranged that it shall be paid by instalments, or wholly or in part by bills of exchange or promissory notes, or secured by bond; and in other cases no particular time is appointed at which the money is to be paid; but it is stipulated that until it is so paid, the purchaser shall pay interest for it from a certain time mentioned in the contract, at which time it is generally also provided that the purchaser shall be let into the possession, and into the receipt of the rents and profits of the estate. (See the form in the Precedents, No. III. clause 1.)

Vendor's lien on property sold for unpaid purchase-money.

Independently, however, of any express agreement to that effect, the vendor who delivers possession of the estate has always a lien upon it for the whole or such part of the purchase-money as remains unpaid (*Herle* v. *Botelers*, Cary's Cha. Rep. 25; *Chapman* v. *Tanner*, 1 Vern. 267; *Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682 (n.); *Coppin* v. *Coppin*, 2 P. Wms. 294; *Fawell* v. *Heelis*, Amb. 724; *Hennand* v. *Moore*, 1 Eden, 237; *Walker* v. *Prestwick*, 2 Ves. 622; *Mackreth* v. *Symmons*, 15 Ves. 129; *Selby* v. *Selby*, 4 Russ. 336; *Ryle* v. *Haggie*, 1 Jac. & Walk. 234; see also Cross on Lien, 88; *Winter* v. *Lord Anson*, 3 Russ. 488; and see 1 Fonbl. Eq. 155 (n. *e*); *ib.* 381 (n. *k*), not only as against the vendee himself, and his representatives, and all persons claiming as volunteers under him, but even against purchasers for valuable con-

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sideration, *where it can be shown that the latter had notice that the money was unpaid* (*Hennand* v. *Moore sup.*); but it will be otherwise in the case of purchasers or other incumbrancers, *without notice*, as in that case their estate under the purchase will supersede the vendor's lien upon the lands: (*Cator* v. *Earl of Pembroke*, 1 Bro. C. C. 301.) Still, to have this operation the estate must be actually conveyed, for between equal equities the rule is, "*qui prior est tempore potior est jure;* consequently, a subsequent incumbrancer, who has not obtained the legal estate, cannot postpone the vendor's lien: (*Ex parte Wright*, Mont. & Ayr. 49; Cross on Lien, 100.) A rule which extends equally to sales of copyhold as of freehold estates: (*Winter* v. *Lord Anson*, 1 Sim. & Stu. 434; 3 Russ. 488.) As between the immediate vendor and the vendee, it will make no difference as to the lien of the former, whether the estate be sold or only contracted for, as the lien will attach equally in either instance, and this, notwithstanding the full consideration is expressed to be paid in the body of the deed, and the receipt is duly indorsed, signed, and witnessed: (*Coppin* v. *Coppin*, 2 P. Wms. 284; *Mackreth* v. *Symmons*, 15 Ves. 337; see the cases cited *supra;* and see also *Pollexfen* v. *Moore*, 3 Atk. 274; *Charles* v. *Andrews*, 9 Mod. 152.) And as the vendor on the one hand has a lien on the property sold for his unpaid purchase-money, so on the other hand the vendee has a similar right where he pays his money before the property has been regularly conveyed to him, or the contract is rescinded either from a defect in the title or other sufficient cause (*Lacon* v. *Mertins*, 3 Atk. 1; *Oxenham* v. *Esdaile*, 2 You. & Jerv. 493; 3 *ib.* 262); but not, it seems, where the contract is of such an illegal or immoral nature as would induce a court of equity to refuse to decree a specific

A subsequent purchase, without notice, will supersede the vendor's lien.

Purchaser has only a lien on the property sold for purchase-money prematurely paid.

performance of it; as the effect of that would be to give the purchaser the benefit of his own illegal act, and this a court of equity will never do: (*Ewing* v. *Osbaldiston*, 2 Myl. & C. 88.)

How vendor's lien will be destroyed.

This lien of the vendor on the purchased lands will, however, be destroyed if he takes a distinct and independent security for his purchase-money; as a mortgage of a portion of the lands sold (*Bond* v. *Kent*, 2 Vern. 281; *Capper* v. *Spottiswoode*, Taml. 21), or of another estate (*Nain* v. *Prowse*, 6 Ves. 752); either of such acts being sufficient to rebut the presumption of his equitable lien, or rather affording evidence of his having altogether abandoned it for a security of another kind; but it will be otherwise where the security taken is merely a personal one; as a bond (*Winter* v. *Lord Anson*, 3 Russ. 488, on appeal reversing *Winter* v. *Lord Anson*, 1 Sim. & Stu. 434, where it was held that the bond had destroyed the lien), promissory note, bill of exchange, or the like, in either of which cases his lien will remain as long as those securities are unpaid (*Herle* v. *Botelers*, Cary's Cha. Rep. 35; *Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682 (n.); *Grant* v. *Mills*, 2 Ves. & Bea. 806; *Saunders* v. *Leslie*, 2 Ball & B. 515; *Ex parte Loaring*, 2 Rose, 59; *Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Blackburne* v. *Gregson*, 1 Cox, 90; *Lynn* v. *Chaters*, 2 Kee. 521), even though the vendee become bankrupt (*Ex parte Peake*, 1 Mad. 346); but a pledge of stock in the funds seems to form an exception to this rule; it having been determined that a pledge of that kind will discharge the vendor's lien: (*Wairn* v. *Prowse*, 6 Ves. 752.) And if a purchaser borrows part of the purchase-money and pays it to the vendor, leaving the rest unpaid, and the conveyance is made to such purchaser stating the transaction, and giving thereunder security to the lender, the concurrence of the vendor will preclude him from any

claim to lien for the remainder of the purchase-money; if not against the purchaser, certainly against the mortgagee: (*Cood* v. *Pollard*, 9 Price, 544; 10 *ib.* 109, *sub. nom. Cood* v. *Cood.*)

When purchase-money will carry interest.

As to the purchase-money carrying interest, it may be laid down as a general rule, that whether it be stipulated to be paid or not, the purchaser will be charged with it if he fails to pay the principal at the appointed time, from which period he will also become entitled to the rents and profits of the estate: (*Lowther* v. *Andover* (*Countess of*), 1 Bro. C. C. 396; *Davy* v. *Barber*, 2 Atk. 490; *Dyer* v. *Hargrave*, 10 Ves. 505; *Fludyer* v. *Cocker*, 12 *ib.* 25; 1 Mad. Pract. 441.) But a purchaser who has not been in possession is only bound to pay interest on the purchase-money, and to take the rents and profits from the time a good title is shown, and not from the time fixed by the agreement for the completion of the purchase: (*Jones* v. *Mudd*, 4 Russ. 118; *Monk* v. *Huskisson*, *ib.* 121.) This rule applies equally to the sales of estates in reversion as to those in possession; the wearing of the lives being treated as equivalent to the receipts of the rents and profits: (*Davy* v. *Barber*, *sup.*; *Ex parte Manning*, 2 P. Wms. 410.)

When purchaser, although in possession, will be exonerated from paying interest.

But the above rule is not without some exceptions, and cases have occurred in which the purchaser has not been so charged, even where he has been in the actual receipt of the rents and profits; as where defects have been discovered in the title which have required time to clear up, during which the purchase-money has been lying idle in the purchaser's hands, and the vendor himself is aware of that circumstance (*Howland* v. *Norris*, 1 Cox, 59); in which case, should he eventually succeed in establishing his title, he will be simply entitled to his purchase-money without any intermediate interest: (*Powell* v. *Martyr*, 8 Ves. 146; 1 Mad. Pract. 441, 2nd

edit.) But to discharge a purchaser from his liability to the payment of interest, his conduct in the transaction must have been perfectly fair; for if it should appear that he has raised frivolous or vexatious objections, or insisted upon unnecessary requisitions, by reason of which the delay has been occasioned, he will be deemed to pay interest from the time he ought to have accepted the conveyance (*Blount* v. *Blount*, 3 Atk. 637); and instances indeed have occurred in which a purchaser, who has been several years in possession, has been decreed to pay interest on the rents and profits during all that interval, notwithstanding the money had remained all that time unproductive in his hands, he being in the daily expectation of being called upon for the payment of it: (*Binks* v. *Lord Rokeby*, 2 Swanst. 122.) In all cases, therefore, where some length of time is likely to elapse before the purchase can be completed, it will be prudent to make some stipulation with respect to the disposal of the purchase-money, as also what is to be the amount of interest to be paid in the interval: (see the form in the Appendix, No. III., clause 1.)

Practical observations.

The usual mode of penning a clause so as to meet a case of this description is the common form I have just before alluded to, viz., that the purchaser is to be let into the possession of the estate, and the vendor to be paid interest at a certain per-centage till the purchase is completed. But it sometimes occurs that a cautious vendor, notwithstanding his equitable lien on the estate sold for his unpaid purchase-money, has still (where some time must necessarily elapse before the title can be completed) a great reluctance to permit such money to remain in the hands, or under the immediate control, of the purchaser. Now, should objections of this kind be made, they may, with the purchaser's consent be easily obviated by extending the clause a little

further, and stipulating that the purchase-money shall be invested in the names of mutual trustees, both of vendor and purchaser, who are to pay the interest, dividends, and annual proceeds to the vendor, from the time the purchaser is let into the possession and receipt of the rents and profits until the conveyance is actually executed and the contract fully completed; or in case the contract should be rescinded, then upon trust to pay the principal, but without interest, to the intended purchaser: (see the form in the Appendix, No. VIII., clause 1.)

How agreements may be framed in the sale of contingent interests.

In the instance of a sale of such estates and interests as may never be executed in possession, and yield no profit in the intermediate time, a clause very similar to that I have just mentioned often proves highly useful. By this it should be agreed that the purchase-money shall be paid into the hands of trustees for both parties, to be by such trustees laid out in some eligible security, and remain so invested until the estate becomes executed in possession, or the contingency becomes impossible by the previous determination of the interest contracted to be sold. For example: suppose lands to be limited to A. for life, remainder to B. for life, remainder to C. in fee; and B. sells his interest to D., and dies in A.'s lifetime, in which case we perceive that B.'s remainder can never take effect in possession. In order to meet a case of this kind, it may be stipulated that the purchase-money shall be paid and invested as above directed, and that upon the estate in remainder becoming vested in possession, and a good title and conveyance of the same made to D., that the principal and all intermediate accumulations shall be paid to B.; but that if B.'s estate determines in A.'s lifetime, then the principal and accumulations to be paid over to D., and the contract to be considered as totally rescinded. A clause of this description

would be often found useful where the next presentation to an advowson is intended to be sold by a tenant for life, without the concurrence of the remainder-men; in which case the right of presentation would altogether fail by the death of the vendor in the lifetime either of the incumbent or remainder-men: (see the form, Precedents, No. VIII., clause 2.)

Provisions, partaking of the character of those I have been just mentioning, may also be employed in the case of the sales by tenants in tail where they are unable to confer an absolute and indefeasible title for want of the consent of the protector to the settlement, when it may be stipulated that some portion of the purchase-money shall be invested upon trust, to be paid either to the tenant in tail, or his representatives, on the title being perfected, or to be paid over to the purchaser, or his representatives, in case this is not done within a given time.

Clause relating to liquidated damages, observations upon.

A clause is often inserted in agreements, though rarely in conditions of sale, by which each of the contracting parties binds himself for the payment of a certain sum in the nature of liquidated damages for the due performance of his part of the contract (see the form in the Precedents, No. II., clause F.; No. VIII., clause 9); and where this is done, provided the clause be accurately framed, the entire sum may be recovered by action; nor have the jury any power in such case to reduce the damages; neither will a court of equity interpose for that purpose. Care must, however, be taken to pen this clause in such terms that its construction cannot possibly admit of any doubtful or equivocal import; and it must state distinctly that the sum paid is to be in the nature of liquidated damages, and not by way of penalty; for if the latter terms were used, the jury would in that case be no longer bound to give the exact sum mentioned, but might, if they thought proper,

assess a lesser amount, because, in the case of a penalty, the degree of injury sustained is the proper criterion by which a jury should be guided in assessing what is the amount of damages they ought to return a verdict for: (*Smith* v. *Dickenson*, 3 Bos. & Pull. 630; *Barton* v. *Glover*, Holt, N. P. C. 43; *Lowe* v. *Peers*, 4 Bur. 2229; *Crisdee* v. *Boulton*, 3 Car. & Pay. 240.) But if a certain specified sum is to be paid as liquidated damages, there the precise sum to be paid is in evidence before them, and upon such evidence they must assess the damages, without any reference to the degree of injury the plaintiff may have sustained thereby: (see the form in the Precedents, No. I., clause 10; No. II., clause E.; No. VII., clause 9.) And it must be kept in mind that the payment of a sum of money, either by way of penalty or as liquidated damages, does not release the parties from their agreement, but they must perform it notwithstanding, and have not an option to pay the penalty and be released from such performance: (2 Mad. Pract. 44, 2nd edit.; *Hobson* v. *Trevor*, 2 P. Wms. 183; *Christ's Hospital* v. *Pugh*, D. P. March 20, 1727; *Howard* v. *Hopkins*, 2 Atk. 371; *Parks* v. *Wilson*, 10 Mod. 518; *Chilliner* v. *Chilliner*, 2 Ves. 528; *Magrave* v. *Archbold*, 1 Dow. 107.)

Neither payment of money by way of penalty, or of liquidated damages, will release parties from the agreement.

It has now become a frequent practice to make time the essence of the contract (*Berry* v. *Young*, 2 Esp. N. P. C. 460 (n.); *Wilde* v. *Forte*, 4 Taunt. 334), which it is determined may be made binding in equity as well as at law (see form, Precedents, No. II., clause 7; *Keen* v. *Stuckley*, Gilb. Eq. Cas. 155; *Lloyd* v. *Collett*, 4 Bro. C. C. 469; *Levy* v. *Lindo*, 3 Mer. 81; *Whitby* v. *Cottle*, 1 Turn. 79; *Hudson* v. *Bertram*, 3 Mad. 440; *Reynolds* v. *Nelson*, 6 *ib.* 18; *Boehm* v. *Wood*, 1 Jac. & Walk. 419; see also 1 Mad. Pract. 415, 2nd edit.); consequently, if the

Time may be made part of the essence of the contract.

purchaser fails to perform his part of the agreement, the vendor will be at liberty to rescind the sale, and re-sell the property; and should he, as I have before remarked, incur any loss thereby, he may recover it from the purchaser, and all consequential expenses; whilst, on the other hand, if any surplus should be produced by such second sale, the vendor will be entitled to retain it for his own benefit: (*Mertins* v. *Adcock*, 4 Esp. N. P. C. 251; *Moss* v. *Mathews*, 3 Ves. 279; *Ex parte Hunter*, 6 *ib.* 94; *Bowles* v. *Rogers*, *ib.* 95, cited.)

Vendor to be empowered to vacate sale in case purchaser objects to title.

Sometimes a vendor stipulates that if the purchaser shall object to the title, the vendor may vacate the sale, on giving notice thereof to the purchaser of his intention so to do, unless the latter will consent to the title unconditionally. But if, after the purchaser has sent in his objections or requisitions, the vendor's solicitor attempts to answer them, but fails to do so to the satisfaction of the purchaser, and a correspondence ensues, the vendor will not then be at liberty to rescind the contract, on repayment of the deposit under the usual condition; but such subsequent negotiation will be considered as a waiver of the right to rescind the contract. Yet it seems, from the suggestion thrown out by Wigram, V.C., in the recent case of *Thorley* v. *Cook* (12 Law Journ. 136), that the vendor might protect himself by answering the question under express protest that it was to be without prejudice to his right of rescinding the contract in pursuance of the terms of the condition; and it seems the same end may also be attained by annexing to the rescinding clause that the vendor's right to vacate the sale shall not be considered as waived by his entering into any negotiation or attempt to obviate the objection, or to remedy any defect that may be objected to: (*Tanner* v. *Smith*, 10 Sim. 410.) (See the form in the Precedents, *infra*, No. II. clause D.)

Purchaser to be empowered to rescind contract in case vendor fails to produce a good title.

On the part of the purchaser it is also usual to insert a clause enabling him to annul the contract, in case the vendor should fail to deliver his abstract and deduce a good title to the estate within a limited time mentioned in the agreement. (See the form in the Precedents, No. II., clause 7; *ib.* clause F.) Another clause is, however, sometimes substituted, enabling either the vendor or purchaser to vacate the sale in case a valid objection should be made to the title within a certain time after the delivery of the abstract—a month for instance—in which case the purchaser is to be entitled to the repayment of all reasonable expenses incurred by him in consequence of his entering into the transaction. (See the form, Precedents, No. II., clause D.) In the case of sales of advowsons or even of next presentations, it is usual to insert a stipulation providing for the contingency of the present incumbent being promoted to a bishopric, in which case the next right of presentation would devolve upon the crown: (*Gib's Codex*, 763, 2nd edit.; *Rex* v. *Bishop of London*, 3 Lev. 382; S.C. 2 Salk. 540; 1 Show. 164; 4 Mod. 200; see also *Rex* v. *Bishop of London and Dr. Lancaster*, 3 Lev. 377; *Grocers' Company* v. *Archbishop of Canterbury*, 3 Wils. 216; S. C. 2 Black. 770.) This circumstance would not, it seems, avoid a contract for the sale of a next presentation, which in a case of this kind, has been construed to mean the next which the grantor is entitled to, consequently that the agreement is not broken by the next right of presentation devolving on the crown by the promotion of the present incumbent to a bishopric, the grantee being still entitled to present to the next vacancy: (*Caillard* v. *Troward*, 2 H. Blacks. 324; S. C. in error, 6 T. R. 439.) In order, however, to provide for every difficulty that may arise, it is usual to stipulate either that the right of presentation so devolving upon the crown,

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the contract shall be unaffected thereby; or to stipulate that in case such an event shall take place, the purchaser shall be entitled to a proportional deduction of price. (See the forms *infra*, No. X., clause 7; No. XI., clauses 4 and A.)

### 3. *Observations upon the Stamp Acts relative to Agreements.*

Agreement should be properly stamped.

By the statute 55 Geo. 3, c. 184, all agreements for the sale of landed property, where the subject-matter of sale amounts to 20*l.* or upwards, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, where the same does not contain more than 1080 words or fifteen folios, must be impressed with a 1*l.* stamp before they can be offered in evidence; and where the same contains more than fifteen folios it will require a 1*l.* 15*s.* stamp, with an additional 1*l.* 5*s.* stamp for every further fifteen folios; and this rule has been so strictly adhered to, that even where an agreement on unstamped paper has been lost or destroyed, parol evidence cannot be given of its contents, even where such agreement has been wrongfully destroyed by the very party who raises the objection. Figures are accounted as words; but an indorsement on the particulars of sale, which contains a mere repetition of the description of the property, which was described in another page of the same particulars, is not to be counted. Neither is a receipt for the penalty put on an agreement at the Stamp-office, when stamped there on payment of such penalty, to be so counted.

When several letters are evidence of an agreement, it is sufficient if one be stamped.

There is also an express proviso in the Act (55 Geo. 3), that where divers letters shall be offered in evidence to prove an agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*,

although the same shall contain in the whole twice the number of 1080 words (fifteen folios) or upwards; and this notwithstanding the letters are written by several persons: (*Perkins* v. *Moravia*, 1 Car. & Payne, 376.) In *Steed* v. *Leddart* (1 Bing. 196), A., by letter, entered into an agreement with B., who became a party to the engagement by writing a memorandum at the bottom of the copy of the letter, and C. afterwards became guarantee for B. to A. by an indorsement on the back of the same letter, in which reference was made to the terms of the agreement on the side of such copy; it was held, on an action on the guarantee, that only one stamp was necessary.

New stipulation after signature will not require additional stamp.

Where an agreement is signed by one party, and previously to the accession of the other party a new stipulation is inserted, the agreement is single and entire, and requires but one stamp: (*Knight* v. *Crockford*, 1 Esp. N. P. C. 189.) And if a paper be produced with a single stamp, and it appears to have contained two distinct agreements, one of which is erased, the stamp is *primâ facie* sufficient, and it lies upon the opposite party to show that both agreements were on the paper at the time the stamp was affixed: (*Waddington* v. *Francis*, 5 Esp. N. P. C. 182.) Where an objection is taken to an agreement containing more than fifteen folios, on the ground of its bearing an insufficient stamp, the party making such an objection must produce a witness who can prove that he has counted the words, and also state positively as to the number. But where the agreement consists of an original and counterpart, and the former is put in and objected to on the grounds above mentioned, the testimony of a witness who has counted the words in the counterpart will afford reasonable evidence that the original contains more than the proper number of words, and the judge will

direct the officer of the court to count the words in the original: (*Lord Dudley* v. *Robins*, 3 Car. & P. 26.)

Want of stamp does not vitiate agreement, but until stamped it cannot be given in evidence.

The want of a stamp does not avoid the agreement, but before it be properly stamped it cannot be received in evidence to prove the contract. It is not, therefore, necessary that the agreement should be stamped at the time the agreement is entered into; but unless this be done before the trial of the cause, the plaintiff must be nonsuited, as the judge will not call on another cause to allow the agreement to be sent to the Stamp-office: (*Lord Dudley* v. *Robins*, 3 Car. & Pay. 26.) A written agreement, although coming out of the possession of the opposite party, cannot be given in evidence as an agreement between such party and a stranger, unless it be stamped: (*Doe dem. St. John* v. *Hore*, 2 Esp. N. P. C. 724.) But if the agreement consists of two parts, and one only is stamped, and this is in the hands of the opposite party, who, upon notice, refuses to produce it, the unstamped part will then be admissible as secondary evidence of the agreement: (*Garnons* v. *Swift*, 1 Taunt. 507; *Walker* v. *Horsfall*, 1 Camp. N. P. C. 501.) If it contains one part only, the party in whose custody it is may be compelled to produce it, and although inadmissible in evidence, whilst unstamped, yet a court of equity will, upon a bill filed, compel the party in whose hands such agreement is to deliver it up in order that the proper stamp may be attached to it. (*Blakey* v. *Porter*, 1 Taunt. 386; *Bateman* v. *Phillips*, 4 *ib.* 157; *King* v. *King*, *ib.* 166; *Street* v. *Brown*, 1 Marsh. 610.)

Agreements for leases at rack-rent exempt from stamp duty.

Memorandums or agreements for granting a lease at rack-rent are expressly exempted from stamp-duty; but this does not include agreements for building-leases, though the rent be under 5*l.*,

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and therefore agreements of this kind must be stamped in like manner as ordinary agreements relating to real property: (*Doe dem. Hunter* v. *Boulcot*, 2 Esp. N. P. C. 595.)

*Aliter* if under hand and seal.

It must also be kept in mind that the above remarks relate only to agreements under hand, for if under hand and seal, they will become covenants, and, as such, will require a deed stamp: (*Robinson* v. *Drybrough*, 1 Esp. N. P. C. 243.)

Recent enactments relating to agreement stamps.

Now, under the recent statute, 7 Vict. c. 21, every agreement that was previously charged with the duty of 1*l.* under the head or title of agreement in the schedule of the statute, 55 Geo. 3, c. 184, is rendered liable to a duty of 2*s.* 6*d.* only. But as this merely relates to such agreements as would only have required a 1*l.* stamp, it will not, it seems, affect agreements exceeding fifteen folios; for these, as I have before observed, will require a 1*l.* 15*s.* stamp, with a further duty of 1*l.* 5*s.* for every subsequent fifteen folios. Neither, it appears, will a 2*s.* 6*d.* stamp be sufficient where divers letters are offered in evidence to support an agreement, even if the whole taken together are less than fifteen folios, as, under the proviso in the act of 55 Geo. 3, c. 184, which renders it sufficient if any one of such letters be stamped; yet it requires a 1*l.* 15*s.* stamp to be employed for that purpose; whereas, the Act of Victoria only allows the 2*s.* 6*d.* stamp to be used in those instances where a duty of 1*l.* only was formerly charged.

In order, however, to render the 2*s.* 6*d.* stamp generally available, a concise form of conditions of sale, and several precedents of agreements, none of them exceeding ten or twelve folios, will be supplied in the Precedents of forms relating to agreements.

Agreement on unstamped paper, &c., may be

The statute of 7 Victoria also directs that if the agreement be written upon paper, vellum,

stamped within fourteen days after signature without paying penalty.

or parchment, unstamped, the commissioners of stamps and taxes will stamp the same, without enforcing any penalty beyond the simple stamp duty, if it be brought to them within fourteen days after it is executed; but if brought afterwards, a penalty of 10*l.* will then attach, in addition to the duty: (section 5.)

# PRECEDENTS

OF

# AGREEMENTS.

## No. I.

### CONDITIONS OF SALE OF FREEHOLD PREMISES.

*Precedents.*

*Conditions of sale of freehold premises.*

[*A short form within fifteen folios, so as to be comprised in a* 2*s.* 6*d. stamp.*]

1. That the highest bidder shall be the purchaser.

2. That the purchaser shall pay a deposit.

3. Vendor to deliver abstract.

4. Vendor to bear expense of disentailing deeds, &c.

5. Power for vendor to annul the sale, in case the purchaser objects to title.

6. Vendor to convey premises on payment of purchase-money.

7. Purchaser to take timber at a valuation.

8. That mistake in description shall not annul sale.

9. Purchaser, on failing to comply with conditions, will forfeit his deposit, and vendor to be at liberty to re-sell the estate.

10. Short form of contract to purchase to be annexed to conditions.

CONDITIONS OF AN AUCTION held on the day of , 184 , at the Bell Inn, in the parish of L., in the county of Devon, by Mr. D. A. W., for selling, on behalf of W. C., Esq., the fee-simple of (*parcels*) situate in L., aforesaid.

1. That the highest bidder shall be the purchaser; that no person shall advance less than £ at any bidding, or retract his biddings; and if any dispute shall arise between

Highest bidder to be purchaser.

*Precedents.*

*Conditions of sale of freehold premises.*

the bidders, the premises shall be put up again at the last bidding.

Purchaser to pay down deposit.

2. That the purchaser shall, immediately upon the lot being knocked down to him, pay to the auctioneer a deposit at the rate of 15*l.* per cent., and sign an agreement to pay the rest of the purchase-money on the day of next, at which time the purchase is to be completed.

Vendor to deliver abstract, and deduce good title.

3. That the vendor will, within one calendar month from the day of sale, at his own expense, deliver to the purchaser an abstract of title of the said premises, and deduce a good and unincumbered title thereto; and the purchaser shall, within twenty-one days next after the delivery of such abstract, signify in writing to the vendor, or his solicitor, his objections or requisitions to the title, if any, and in default of so doing shall be considered to have accepted the title unconditionally.

Vendor to bear expenses of disentailing deeds, &c.

Expense of getting outstanding debts to be borne by purchaser.

4. That the vendor shall bear the expense of all disentailing deeds, as also any acknowledgments of married women that may be necessary for perfecting the title; but the expense of the conveyance, assignment, or surrender of any outstanding estate, term, or interest, or of obtaining any probate or letters of administration, shall be borne by the purchaser, as also the expense of comparing title-deeds and other documents, and also of all attested and other copies and covenants for the production of title-deeds; and the recitals of descents, births, marriages, deaths, payments of money, heirships, intestacies, devises, vesting of terms, and other facts contained in deeds, or court rolls of twenty years old and upwards shall be deemed sufficient evidence of the facts and documents therein recited.

Vendor empowered to annul sale, in case purchaser objects to title.

5. That in case the purchaser shall object to the title, the vendor shall be at liberty to annul the sale, on returning the deposit to the purchaser without interest, and paying all reasonable expenses incurred by the purchaser in respect of such contract.

Vendor to convey premises on

6. That upon payment of the residue of the purchase-money at the time hereinbefore appointed, the vendor and all necessary

parties will convey the premises to the purchaser; the purchaser, at his own expense, to prepare and tender the conveyance to the vendor and other necessary parties for execution; but the expenses of the execution to be borne by the vendor.

*Precedents.*

*Conditions of sale of freehold premises.*

7. That the purchaser shall take at a fair valuation all timber trees, standels, tellors, and pollards, as well of ash, oak, elm, beech, fir, sycamore, as of every other description whatsoever; and although not strictly considered timber according to the custom of the country (except apple and other fruit trees), now growing on the premises, down to the value of one shilling a stick, inclusive; and in case of any disagreement, the value shall be fixed by the award of two referees, one to be chosen by the vendor and the other by the purchaser; and if such referees cannot agree, they are to call in an umpire, whose decision shall be final; and in case either party shall refuse to name a referee, the referee of the other party may proceed alone, and his determination shall be conclusive on all parties.

receiving purchase-money.

Purchaser to take timber at a valuation.

8. That if any mistake be made in the description of the premises, or of the vendor's interest therein, such misdescription shall not annul the sale, but a compensation shall be given or taken as the case may require, the amount of which shall, in case of dispute, be settled by the award of two referees, or their umpire, in manner aforesaid.

Mistake in description not to annul sale.

9. Lastly, that if the purchaser shall fail to comply with the above conditions, his deposit shall be absolutely forfeited to the vendor, who shall immediately thereupon be at liberty to resell the estate in any way he may think proper; and any deficiency that he may incur by such second sale, together with all incidental expenses, shall be borne by the defaulter at this present sale, which in case of nonpayment may be recoverable by the vendor as liquidated damages, without his tendering any previous conveyance to the purchaser.

Purchaser on failing to comply with conditions will forfeit deposit, and vendor to be at liberty to resell the estate.

10. I, A. B., of C., in the county of D., Esq., hereby acknowledge that I have this day become the purchaser of the above-mentioned premises at the price of £ ; £ , part of which, I have paid to Mr. D. A. W., the auctioneer, by way of deposit, and £ , the remainder, I agree to pay at the time appointed

Short form of contract to be annexed to purchase.

*Precedents.*

*Conditions of sale of freehold premises.*

by these conditions; and I, the said D. A. W, as agent for the said W. C., do hereby agree to accept the said A. B. as purchaser, and also admit that I have received the said sum of £ by way of deposit, and do further agree in all other respects to fulfil the same conditions: As witness our hands this day of , 184 .

A. B.

D. A. W., as agent for W. C., Esq.

Witness,

## No. II.

### AGREEMENT FOR THE PURCHASE OF A FREEHOLD ESTATE.

*Precedents.*

*Agreement for the purchase of a freehold estate.*

1. Vendor agrees to sell and to deliver abstract.

2. To furnish abstracts.

3. That on receiving purchase-money, vendor will convey.

4. Purchaser agrees to purchase.

5. Mutual agreement between vendor and purchaser, that the expense of disentailing deeds, &c., shall be borne by vendor.

6. Recitals of descents, &c., in deeds of twenty years old, and upwards, to be deemed sufficient evidence of those facts.

7. That conveyance shall be prepared by and at purchaser's expense.

8. That if vendor shall fail to deliver abstract, purchaser shall be at liberty to annul the sale.

A. Clause directing that the conveyance or assignment of outstanding estates shall be prepared at the expense of the purchaser.

B. Agreement that if premises are subject to any incumbrances, the same shall be discharged by vendor.

C. Purchaser to be at the expense of comparing title-deeds and other evidences of title.

D. Clause empowering the vendor to rescind the contract, in case the purchaser shall object to the title.

E. Clause for annulling sale, where purchaser fails to complete his contract.

F. Clause enabling purchaser to rescind contract, in the case of misdescription of the property.

ARTICLES OF AGREEMENT entered into this day of . 184 , *between* (*vendor*), of, &c., for himself, his heirs, executors, and administrators, (*a*) of the one part, and (*purchaser*), of, &c., for himself, his heirs, executors, and administrators, (*b*) of the other part.

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(*a*) If the agreement is to be entered into by vendor's agent, add,

"By A. B., of, &c., his attorney or agent, lawfully appointed in that behalf."

(*b*) If the agreement is by purchaser's agent, add

"C. D., of, &c., his attorney or agent lawfully constituted for that purpose."

*Precedents.*

*Agreement for the purchase of a freehold estate.*

1. The said (*vendor*) doth hereby agree with the said (*purchaser*) to sell to him the said (*purchaser*) the fee-simple and inheritance, free from incumbrances, (*a*) of and in (*all, &c., here describe the parcels.*)

Agreement to sell.

To furnish abstracts.

2. And also that he the said vendor will at his own expense, within one calendar month from the date hereof, deliver an abstract of title of the said premises to the said (*purchaser*) or his solicitor, and deduce a good title thereto, subject to the conditions and stipulations hereinafter contained.

That on receiving purchase money, vendor will convey.

3. And if the solicitor of the said (*purchaser*) shall approve of the said title, the said (*vendor*), or his heirs, and all necessary parties, will, on or before the day of next (*b*) [on receiving from the said (*purchaser*), his executors, administrators, or assigns, the said sum of £ ], at the costs of the said (*purchaser*), his executors, administrators, or assigns, as hereinafter mentioned, execute a proper conveyance, and all other necessary assurances for effectually conveying and assuring the fee-simple and inheritance of the said (*parcels*) and premises with their appurtenances, unto the said (*purchaser*), his heirs, or assigns, or to such uses as he or they shall direct or appoint, free from incumbrances, with the usual and proper covenants for title, freedom from incumbrances, and for further assurance. (*c*)

Purchaser agrees to purchase.

4. *In consideration* whereof the said (*purchaser*) doth hereby agree with the said vendor, that he, the said (*purchaser*), his executors or administrators, will, on or before the day of next, upon the execution of and perfecting of such conveyances and assurances as aforesaid, pay unto the said (*vendor*), his executors, administrators, or assigns, the said sum of £ , the full purchase-money of the said (*parcels*) and premises.

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(*a*) If the property is to be sold off subject to a mortgage or any incumbrances, insert here such one of the clauses in No. IV., as may be adapted to the particular circumstances of the case.

(*b*) If the consideration is a transfer of stock, substitute for the words within brackets, Clause C., No. II., *infra*.

(*c*) If the vendor is intended to retain the title deeds, insert one of the clauses, No. III., Clauses 2, 3, according to circumstances.

*Precedents.*

*Agreement for the purchase of a freehold estate.*

5. *And it is hereby mutually agreed* by and between the said (*vendor*) and (*purchaser*), that the expense of all disentailing deeds, of acknowledgments of married women, covenants for the production of title-deeds [as also the conveyance, assignment, or surrender of any outstanding estate, term, or interest, and the obtaining of any probate, or letters of administration, shall be borne by the said (*vendor*.)]. (*a*)

Expense of disentailing deeds, &c. to be borne by vendor.

(*a*) If, as frequently happens, it is intended that the purchaser is to bear the expense of getting in outstanding estates, omit the words within the brackets, and substitute,

Conveyance or assignment of outstanding estate, letters of administration, &c., to be at purchaser's expense.

A. "But the conveyance, assignment, or surrender of any outstanding estate, term, or interest, and the obtaining of any probate or letters of administration, or any document required for evidencing the title thereof, shall be prepared or obtained by the solicitor of the said (*vendor*) at the expense of the said (*purchaser*)."

If the lands are supposed to be subject to any heavy incumbrances, the following clause may often be usefully employed:—

Incumbrances to be discharged by vendor.

B. "And it is hereby declared and agreed, that if the said (*parcels*) and premises, or any of them, shall be subject to any incumbrances, all and every of such incumbrances shall be fully paid off and discharged, or otherwise satisfied by the said (*vendor*), and the said premises, at his own expense, be effectually exonerated and released therefrom, previously to the conveyance to the said (*purchaser*); which said release or discharge shall be made by a separate and distinct assurance, or assurances, to be prepared by the solicitor of, and at the expense of the said (*vendor*), and to be approved of by the solicitor of, and at the expense of the said (*purchaser*), and the incidental expenses attendant on execution of such assurance or assurances shall be defrayed by the said (*vendor*)."

It has been already stated (*ante*, p. 32) that the expense of the production and examination of title-deeds, including journeys, and the expense of providing the purchaser with attested copies, must, if required, be borne by the vendor, unless otherwise stipulated for in the contract; when, therefore, the vendor is desirous of avoiding this expense, a clause to the following effect should be here inserted:—

Purchaser to be at the expense of

C. "But that the said (*purchaser*) shall be at the expense of comparing the title-deeds, wills, and evidences of title,

*Precedents.*

*Agreement for the purchase of a freehold estate.*

comparing title deeds, &c.

Recital of descents, &c. to be deemed sufficient evidence of such facts.

6. Recitals of descents, births, marriages, and deaths, payments of money, heirships, intestacies, devises, vestings of terms of years, and all other facts, of what nature or kind soever, contained in deeds, or court-rolls, or wills, twenty years old, or upwards, shall be deemed sufficient evidence of such facts respectively: and where on account of any property having been conveyed under a defective description, or any hedges having been removed, or other evidence of seisin or identity, or of boundaries not afforded on the face of the deeds, a declaration (in pursuance of the act of Parliament "*for the substitution of declarations in lieu of voluntary and extra-judicial oaths*") of undisturbed possession, or receipt of the rents for twenty years and upwards, according to the title deduced, or of the identity of the premises, shall in any case, not especially provided for by this contract, be deemed sufficient evidence of identity.

That conveyance shall be prepared by and at purchaser's expense.

7. That the deed of conveyance of the said (*parcels*) and premises shall be prepared by the solicitor of, and at the expense of the said (*purchaser*); and such conveyance shall be settled and approved of on the part of the said (*vendor*) and (*purchaser*) by their respective counsel or solicitors, and each of them the said (*vendor*) and (*purchaser*) shall pay the respective costs of his own solicitor and counsel.

That if vendor shall fail to deliver abstract, purchaser may rescind sale.

8. And lastly, that if the said (*vendor*) shall not deliver his abstract of title to the said (*purchaser*), his heirs or assigns, within the space of one calendar month from the date hereof, or shall not deduce a good marketable title to the said (*parcels*) and premises, and every part of the same, before the said

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whether of record or not, and whether in the possession of the said (*vendor*) or not, with the abstract; the said (*vendor*) engaging to furnish an abstract thereof, and to acquaint the said (*purchaser*) when and where such wills, or other evidences of title on record, were proved and recorded, and with whom such of the title-deeds as are not in the custody of the said (*vendor*) are, and may be so compared, and that the expense of all attested or other copies of such deeds, wills, or other evidences of title, which the said (*purchaser*) shall require, shall be furnished him at his own costs."

day of next, as the case may be, this present contract shall, at the option of the said (*purchaser*), his heirs or assigns, be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid the performance or execution of this agreement shall not be enforced against the said (*purchaser*) in any court of equity, notwithstanding any rule, if such rule there be, that time cannot be made the essence of a contract, or any other rule or maxim whatsoever. *In witness* whereof the said parties have hereunto set their hands the day and year first above written.(*a*)

WITNESS,

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(*a*) Sometimes the following clause for rescinding the contract is substituted for the above :—

Vendor to be at liberty to rescind contract, if purchaser makes any objection to the title.

D. "AND LASTLY, that if the said (*purchaser*), or his solicitor, shall make any objection to the title, the said (*vendor*) shall be at liberty, if he shall think fit, by notice in writing under his hand, to annul the sale, and thereupon such sale shall become absolutely void; and the said (*purchaser*) shall be repaid all the reasonable costs expended by him in respect of such contract, and each contracting party shall be placed in the same situation as if no such contract had ever been entered into; unless the said (*purchaser*) shall, within the space of twenty-one days next after receiving such notice from the said (*vendor*) of his intention to annul the sale as aforesaid, agree to accept the title unconditionally. And such right of the said (*vendor*) to annul the sale as aforesaid shall not be considered to be waived, or in any manner affected, by any negotiation as to such objection or requisition, or any attempt or endeavour to obviate such objection, or to remedy any defect that may be objected to."

Right of vendor to annul sale not to be waived by any subsequent negotiation.

Clause for annulling sale, where the purchaser fails to complete his contract.

E. "AND LASTLY, that if the said (*purchaser*) shall neglect or refuse to complete his contract, upon the terms and conditions aforesaid, the said (*vendor*) shall be at liberty to annul the sale and resell the said premises, either by public auction or private contract, and either together or in parcels, or in such other manner as the said (*vendor*) shall think proper; and if upon any resale there shall be any deficiency, the said (*purchaser*)

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*Agreement for the purchase of a freehold estate.*

shall make good the same, together with all costs and expenses attending such resale, or incidental thereto, as and for liquidated damages, for the breach and non-performance of such contract, and not by way of penalty. *In witness*, &c."

Clause enabling the purchaser to rescind the contract in case of misdescription of the property.

F. "*But it is nevertheless* agreed, that if the said (*vendor*) shall fail to make a good title at the time appointed, to the whole of the premises hereby contracted for, or the same should contain a lesser quantity than acres, statute measure [or in case the said manor should prove a manor by reputation only],* or in case the said premises, or any portion of them, should not prove to be of freehold tenure; then, and in all, any, or either of such cases, the said (*purchaser*) shall be at full liberty to rescind the contract, which from thenceforth shall be utterly void to all intents and purposes whatsoever."

* In case there is no pretence for describing the property as a manor, omit the words within the brackets.

# No. III.

## CLAUSES ADAPTED TO VARIOUS PURPOSES.

1. Where time is not intended to form part of the essence of the contract.

2. Agreement that vendor shall retain title-deeds, and furnish purchaser with attested copies.

3. Agreement that title-deeds shall be delivered to the purchaser.

4. Statement that the consideration of the sale is a sum in gross and an annuity.

5. That principal is to be calculated at so many years' purchase.

6. That the price is to consist of so much stock.

7. Another form relating to stock.

8. Agreement that part of purchase-money shall be secured by a mortgage of the property sold.

9. Stipulation that trifling errors shall not annul the contract.

10. Purchaser to give up the possession, in case he refuses to take the title.

### 1. *Where time is not intended, &c.*

Purchaser to receive rents and profits, and pay interest on the purchase-money.

That the said (*purchaser*) shall receive and take the rents, issues, and profits of the said (*parcels*) and premises from the day of next, for his and their own use and benefit; and that if the said conveyance and other necessary assurances for perfecting the title to the said premises should not be executed by all the necessary parties, and the said purchase-money be not paid on or before the said day of , then and in such case the said (*purchaser*), his heirs, executors, administrators, or assigns, shall, from the said day of , pay unto the said (*vendor*), his executors or administrators, a sum of money in the nature of interest upon such purchase-money, or so much thereof as shall remain unpaid, to be calculated after the rate of £5 for every £100 by the year, so long as such purchase-money shall remain undischarged.

### 2. *Agreement that vendor shall retain, &c.*

Vendor to retain title-deeds relating also to other property, of

And it is hereby declared and agreed, that such of the title-deeds and muniments of title relating to the title of the said (*parcels*) and premises, as shall be found to relate to other property of the said (*vendor*), of equal or greater value, shall be

*Precedents.*

*Clauses adapted to various purposes.*

retained by him, [on his delivery, at his own expense, of true and attested copies of all and every such title-deeds and muniments of title, and on his entering into the usual covenant, likewise to be prepared at his expense, for the production of the originals];(*a*) but such covenant to become, nevertheless, void, in case the said (*vendor*) should afterwards sell the property retained by him, or any portion of the same, and deliver the same title-deeds and muniments of title to the purchaser thereof, and procure such purchaser to enter into the same or the like covenants.

greater value, upon entering into a covenant for their production.

3. *Agreement that title-deeds shall be delivered to purchaser.*

Title-deeds to be delivered over to purchaser upon his entering into the usual covenant for their production.

That all such title-deeds and all other documents concerning the title of the said premises as shall be found to relate to other property of the said (*vendor*) of inferior value, shall be delivered over to the said (*purchaser*) upon the completion of the purchase, and the said (*vendor*) shall be entitled, at his own expense, to be supplied with true and attested or other copies, extracts, or abstracts of such deeds and documents as he shall think fit; and also that the said purchaser will, at the costs of the said vendor, enter into the usual covenant for the production of such original deeds and documents; but such covenant to be void in case the said purchaser should afterwards sell the whole or any part of the said property so agreed to be purchased by him, and deliver the same deeds and writings to the purchaser of the same, and procure such purchaser to enter into the same or the like covenants.

4. *Statement that the consideration, &c.*

Clause stating that the consideration of the sale is a sum in gross and an annuity.

And the consideration agreed upon for the purchase of the said premises is the sum of £ sterling, and an annuity or annual rent-charge of £ , to be issuing out of and chargeable upon the said premises, and to be payable to the said (*vendor*), during the term of his natural life, by four equal quarterly payments, viz., the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of

(*a*) When the purchaser is to be at the expense of the attested copies, omit the words within the brackets, and substitute the clause next following.

March, in every year, clear of all deductions whatsoever, with a proportionate part of the said annuity up to and until the death of the said (*vendor*), which said annuity is to commence from the day of next.

5. *That principal is to be calculated by so many years' purchase.*

Where the price is to be calculated at so many years' purchase.

The said (*vendor*) doth hereby agree with the said (*purchaser*) to sell to him the said (*purchaser*) the fee-simple and inheritance of and in all, &c. [*Here describe parcels*] free from all incumbrances, excepting a certain lease of the entirety of the said premises, for the term of fourteen years, at the yearly rent of £250, payable quarterly, as therein mentioned, at or after the rate of years' purchase, to be computed by the said yearly rent so reserved by the said hereinbefore mentioned lease.

6. *That price is to consist of so much stock.*

Where stock is the consideration for the purchase.

At or for the price or sum of £5,000, Three per Cent. Reduced Annuities, to be transferred into the name of the said (*vendor*) in the books of the Governor and Company of the Bank of England, at the time and in manner hereinafter appearing.

7. *Another form relating to stock.*

That stock is to be transferred into vendor's name.

Or upon the capital sum of £5,000, Three per Cent. Reduced Annuities, being transferred into the name and for the use of the said (*vendor*) in the books of the Governor and Company of the Bank of England.

8. *Agreement that part of the purchase-money, &c.*

Part of purchase-money to be secured by mortgage.

In consideration whereof, the said (*purchaser*) doth hereby agree with the said (*vendor*), that he, the said (*purchaser*), his heirs, executors, or administrators, will pay or secure the purchase-money of the said premises unto the said (*vendor*) in manner following, viz., the sum of £ , being one third-part of the said purchase-money, or sum of £ , to be paid unto the said vendor, his executors or administrators, on the execution of the conveyance of the said premises, and the sum of £ , being the remaining two third-parts of the said purchase-money, with interest for the same, at the rate of £5 for

*Precedents.*

*Clauses adapted to various purposes.*

every £100 by the year, to commence from the execution of the aforesaid conveyance, to be secured by a mortgage in fee of the said premises, such mortgage to contain the usual powers of sale and covenants contained in mortgages of real property.

9. *Stipulation that trifling error shall not, &c.*

Trifling errors shall not annul the contract.

No trifling error or omission respecting the quantity or other description of the said premises shall annul this contract, but a proportionate abatement shall, in such case, be made, and be deducted out of the said purchase-money, or some other equivalent shall be given or allowed by the said (*vendor*); and in case of any disagreement thereupon between the said parties, the same shall be referred to the arbitration of two indifferent persons, one to be chosen by the said (*vendor*), and the other by the said (*purchaser*), who, if they cannot agree, shall call in an umpire, whose decision shall be final between the parties; and in case either party shall refuse to name a referee, then the referee named by the other party may proceed alone, and his determination shall be conclusive on all parties.

10. *Purchaser to give up possession in case he refuses to take the title.*

Purchaser, when let into possession, to deliver up the same in case he does not accept title and pay purchase-money.

That if the said (*purchaser*) does not accept the title, and pay the residue of the said purchase-money on or before the day of , he shall deliver up possession of the said premises to the said (*vendor*), free from all incumbrances, or injury by waste, or any other act or thing created or committed upon the same premises; and in default thereof the said (*vendor*) shall be at liberty to re-enter upon the said premises, without let, hinderance, or process of law, and to have, hold, and enjoy the same as and for his first and former estate.

## No. IV.

CLAUSES TO BE INSERTED ACCORDING TO CIRCUMSTANCES, WHEN THE PROPERTY IS TO BE SOLD SUBJECT TO ANY INCUMBRANCES.

1. Declaration that property is sold subject to a mortgage.
2. Where the incumbrance is a rent-charge.
3. Where the property is sold subject to leases.
4. Where the tenancy is only from year to year.

Declaration that property is sold subject to a mortgage.

1. Excepting only a mortgage in fee of the said premises created by a certain indenture of appointment, dated the day of , 184 , and made between the said (*vendor*), of the one part, and (*mortgagee*), of, &c., of the other part, for securing the sum of £ , and interest, at the rate of £4 per cent. per annum, which said sum of £ , and the interest from the day of now next, it is agreed shall be discharged by the said (*purchaser*), who shall effectually indemnify the said (*vendor*) therefrom.

Where the incumbrance is a rent-charge.

2. Excepting only an annuity or annual rent-charge of £ , payable quarterly, to A. B., of , &c., widow, for her life, issuing and payable out of the said premises, and granted and created by [*here recite shortly the instrument by which the rent-charge was created*], and which said annuity or yearly rent-charge, from the day of now next, it is agreed shall be discharged by the said (*purchaser*).

Where the property is sold subject to leases.

3. Excepting such leases not exceeding the term of fourteen years, or any lesser term, as the said vendor may have already granted, of the said premises, or of some part thereof, at the full improved rents reserved, to be payable yearly, or more frequently, during the continuance of the estates granted by the same leases respectively.

Where the tenancy is only from year to year.

4. Excepting only the tenancy from year to year, of A. B., yeoman, in the said premises, under the yearly rent of £ .

## No. V.

### AGREEMENT FOR THE PURCHASE OF LEASEHOLD PROPERTY.

1. Agreement to purchase, subject to rents and covenants.

2. That vendor will deliver an abstract.

3. That if purchaser shall approve of title, vendor will, on receiving his purchase-money, assign premises to purchaser.

4. That vendor will discharge all outgoings up to a certain period.

5. Agreement by purchaser to pay purchase-money and indemnify vendor from covenants in original lease.

6. Also, if required, to execute a bond, &c., for performance of rents and covenants.

ARTICLES OF AGREEMENT (*between vendor and purchaser, as in heading agreement* No. II., *only omitting the heirs of the parties*).

Agreement to purchase, subject to rents and covenants.

1. The said (*vendor*), in consideration of the sum of £ , doth hereby agree with the said (*purchaser*) to sell to him the said (*purchaser*) all his the said (*vendor's*) estate, term, and interest of and in all (*here describe parcels*), for the residue of the term of years, from the day of , 1796, granted and created by a certain indenture, dated the day of , 1796, and made between (*lessor*), of the one part, and (*lessee*), of the other part, subject to the rents, covenants, conditions, provisoes, stipulations, and agreements therein contained, on the part of the lessee to be observed and performed.

That vendor will deliver an abstract.

2. And also that the said (*vendor*) will, at his own expense, within one calendar month from the date hereof, deliver unto the said (*purchaser*), or his solicitor, an abstract of the said indenture of lease, and all subsequent deeds and writings relating thereto; (*a*) [but the said vendor shall not be required

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(*a*) If the vendor is to produce his lessor's title, substitute the following clause for that within the brackets:—

"And also of the title of the said lessor to the said premises."

to produce his lessor's title, nor to furnish any abstract thereof, nor any other evidence of any deeds, wills, documents, or other writings, or any other matters whatever relating to or concerning the title of the said premises, anterior to the said indenture of the day of , whereby the said term was granted or created.]

That if purchaser shall approve of title, vendor will, on receiving his purchase-money, assign premises to purchaser.

3. And if the solicitor of the said (*purchaser*) shall approve of the said title, the said (*vendor*) will, on receiving the said purchase-money, and with the concurrence of all necessary parties, and at the costs of the said (*purchaser*), assign or otherwise effectually assure the said (*parcels*) unto the said (*purchaser*), or as he shall appoint, for all the residue of the said term, free from all incumbrances, except the rents, covenants, conditions, provisoes, stipulations, and agreements so as aforesaid reserved and contained in the original lease of the said premises.

That vendor will discharge all outgoings up to a certain period.

4. That the said (*vendor*) will pay, satisfy, and discharge all rates, taxes, tithes, assessments, and other outgoings for the said premises up to the day of next.

Agreement by purchaser to pay purchase-money and indemnify vendor from covenants in original lease.

5. And the said (*purchaser*) hereby agrees to pay the said sum of £ , and also shall and will, in and by the said deed of assignment to him, if thereunto required by the said (*vendor*), enter into a covenant thenceforth to pay the rent and perform the covenants reserved and contained in the said indenture of lease, and to indemnify the said (*vendor*) therefrom.

Also, if required, to execute a bond, &c., for performance of rents and covenants.

6. And also shall and will, if thereunto required by the said (*vendor*), execute a duplicate or counterpart of the said deed of covenant, or enter into a bond, in a sufficient penalty for payment and performance of the said rents, covenants, conditions, provisoes, stipulations, and agreements; the same duplicate or counterpart, covenant, or bond to be prepared by and at the costs of the said (*vendor*).

[*If time is to be the essence of the contract, insert clause at the end of Precedent* No. II.] *In witness*, &c.

## No. VI.

### AGREEMENT FOR THE SALE OF A FREEHOLD ESTATE, AND OF LEASEHOLD PREMISES, DETERMINABLE ON LIVES.

1. Vendor agrees to sell freehold and leasehold premises to purchaser.

2. Vendor to deliver abstracts of title of both descriptions of property to purchaser.

3. Vendor, on receiving purchase-money, to convey and assign premises to purchaser.

4. Agreement by purchaser for payment of purchase-money.

5. Purchaser, if thereunto required, to covenant for payment and performance of the rents and covenants contained in the original lease of premises.

6. That number of acres and ages of lives are believed to be correct, but are not warranted to be so.

7. Contract not to be affected by any damage or deterioration in value the property may sustain before completion of purchase.

[INSERT HEADING, *ut ante*, p. 117.]

Vendor agrees to sell freehold and leasehold premises.

1. The said (*vendor*), in consideration of the sum of £ agrees to sell to the said (*purchaser*) the fee-simple and inheritance, free from incumbrances, of and in all (*here describe the freehold parcels*); and also the estate, term, and interest of him the said (*vendor*), for the residue of a term of ninety-nine years, determinable on the lives of (*nominees*), granted and demised by indenture bearing date the day of , and made between (*lessor*), of the one part, and (*the original lessee*), of the other part, of and in all (*here describe leasehold premises*).

Vendor to deliver abstracts of title of both descriptions of property.

2. And also that the said (*vendor*) will, at his own costs, within the space of one calendar month from the date hereof, deliver unto the said (*purchaser*), or his solicitor, perfect abstracts of the title to the said freehold and leasehold premises respectively; but the said (*vendor*) shall not be required to produce the title of the original lessor of the said leasehold premises, or any further evidence of title thereto than the original lease and all subsequent deeds, writings, and evidences relating to the same.

*Agreement for the sale of a freehold estate, &c.*

3. And also shall and will, on or before the day of next, upon receiving the said purchase-money, by good and sufficient conveyances, assignments, and assurances, to be prepared by and at the costs of the said (*purchaser*), and with all necessary parties, convey, assign, and assure unto the said (*purchaser*), or as he shall appoint, the said freehold and leasehold premises respectively, free from all incumbrances, except the rents, covenants, and conditions contained in the said original indenture of lease.

Vendor, on receiving purchase-money, to convey and assign premises.

4. And the said (*purchaser*) agrees, upon the said premises being so conveyed and assigned to him as aforesaid, to pay to the said (*vendor*) the said purchase-money, or sum of £ .

Agreement by purchaser for payment of purchase-money.

5. And also that the said (*purchaser*) shall and will, if thereunto required by the said (*vendor*), covenant in the deed of assignment of the said leasehold premises for payment of the rent and performance of the covenants in the said original indenture of lease of the said premises respectively reserved and contained, and to indemnify the said (*vendor*) therefrom.

Purchaser, if required, to covenant for payment and performance of rents and covenants.

6. That the number of acres and ages of the lives are believed to be correctly set forth in the original lease of the said premises, but are not warranted to be so; but should any error appear to have been made therein to the prejudice of the said (*purchaser*), such error shall not vacate the sale, but the said (*purchaser*) shall accept such compensation as shall be fixed by two referees, one to be chosen by the said (*vendor*), and the other by the said (*purchaser*), who, if they cannot agree, shall call in an umpire, whose decision shall be final; and in case either party shall refuse to appoint a referee, then the referee appointed by the other party shall proceed alone, and his decision shall be final and conclusive upon both parties.

That number of acres and ages of lives are believed to be correct, but not warranted.

7. *And further*, that any damage that may happen to all or any of the said premises by fire, inundation, tempest, or earthquake, or diminution or total cesser of interest therein, by the dropping of any or all the lives whereon the estate of the said (*vendor*) in the said leasehold premises is determinable between

Contract not to be affected by any damage or deterioration in value the property

*Precedents.*

*Agreement for the sale of a freehold estate, &c.*

may sustain before completion of purchase.

the date hereof and the completion of the purchase, shall not in anywise affect or vacate the present contract, but the whole of such losses shall be borne by the said (*purchaser*), who, in like manner, shall be entitled to any increase of value that may accrue to the said premises.

[*It will be proper to add clauses for rescinding the contract in case no title can be made; clause as to errors in description, ut sup.* No. II., clause 7.] *In witness, &c.*

## No. VII.

### AGREEMENT FOR THE PURCHASE OF COPYHOLDS OF INHERITANCE.

1. Vendor agrees to sell premises.
2. To deliver abstract.
3. That if purchaser approves of title, vendor will surrender to his use.
4. Vendor to execute usual deeds of trust and covenant.
5. Purchaser agrees to purchase, and pay purchase-money.
6. Mutual agreement between vendor and purchaser to pay fees and charges of their respective counsel and solicitors.
7. That all outgoings shall be discharged by vendor up to the time of surrender.
8. That purchaser shall defray the expense of examining court-rolls, &c.
9. That purchaser shall pay the expense of surrender and admission, and of the fine payable thereupon.

[INSERT HEADING, *ut ante*, p. 117.]

Vendor agrees to sell premises.

1. The said (*vendor*) doth hereby agree with the said purchaser to sell to the said (*purchaser*) the inheritance in possession, according to the custom of the manor of A., in the county of Somerset, of and in all that [*here describe copyhold premises*], for the price of £ .

To deliver abstract.

2. Also that the said (*vendor*) will, within the space of one calendar month from the date hereof, at his own expense, deliver to the said (*purchaser*), or his solicitor, an abstract of the title of him the said (*vendor*) to the said copyhold premises.

That if purchaser approves of title, vendor will surrender to his use.

3. That if the solicitor of the said (*purchaser*) shall approve of the said title, then the said (*vendor*), and all persons having any estate in the said copyhold premises, shall, on or before the day of next, duly surrender the same premises, according to the custom of the said manor, to the use of the said (*purchaser*), his heirs or assigns, or as he or they shall direct, to be holden at the will of the lord, according to the custom of the said manor, subject to the ancient rents, suits, and services therefore due and of right accustomed in respect thereof; but free from all other incumbrances whatsoever.

*Precedents.*

*Agreement for the purchase of copyholds of inheritance.*

4. That the said (*vendor*), and all other persons interested in the said copyhold premises, will, on or before the said day of , execute the usual deeds of trust and covenant for title of the same premises.

Vendor to execute usual deeds of trust and covenant.

5. In consideration whereof, the said (*purchaser*) doth hereby agree with the said (*vendor*), that on such surrender being made and perfected, and such deeds of trust and covenant executed as aforesaid, that he the said (*purchaser*) will pay unto the said (*vendor*) the said sum of £ .

Purchaser agrees to purchase and pay purchase-money.

6. *And it is hereby mutually agreed* by and between the said (*vendor*) and (*purchaser*), that each of the said parties shall pay the fees and charges of his own counsel and solicitor, in attending the investigation of the said title, in the usual and ordinary course of business.

Mutual agreement between vendor and purchaser to pay charges of respective counsel.

7. That all rates, taxes, and outgoings payable for or in respect of the said copyhold premises, shall be paid by the said (*vendor*) up to the time of the surrender of the said premises and admittance of the said (*purchaser*) to the same.

That all outgoings shall be discharged by vendor up to the time of surrender.

8. That the said (*purchaser*) shall defray the expense of examining the court-rolls of the said manor, and of any special courts which may be deemed expedient, as also of comparing the title-deeds, wills, court-rolls, and other evidences of title with the abstract; the said (*vendor*) engaging to furnish abstracts thereof, and to inform the said (*purchaser*) when and where such wills and other evidences of title were proved and recorded.

That purchaser shall defray the expense of examining court-rolls, &c.

That purchaser shall pay the expense of surrender and admission, and of the fine payable thereupon.

9. That the said (*purchaser*) shall pay the expenses of the said surrender, and of all fees and fines upon such surrender to, and admission of, the said (*purchaser*) to the said premises, and that the deed of trust and covenant shall be prepared by and at the expense of the said (*purchaser*). And for the due performance of the several agreements herein contained on their respective parts, each of them the said parties hereto bindeth himself, his heirs, executors and administrators, unto the other of them, his executors, administrators, and assigns, in the sum of £ , by way of liquidated damages for the non-performance of such agreement, and not by way of penalty. *In witness*, &c.

## No. VIII.

1. Clause stipulating that part of the purchase-money shall be invested until one of the conveying parties shall attain the age of twenty-one, and concur in the conveyance.

2. Stipulation that purchase-money shall be invested, to be repaid to the purchaser in case the contingency upon which the vendor's title depends should fail.

Clause stipulating that part of the purchase-money shall be invested until one of the conveying parties shall attain twenty-one, and concur in the conveyance.

1. And whereas A. B., who is a necessary party to the conveyance of the said premises, is now an infant under the age of twenty-one years,—viz., only fourteen years of age,—and is consequently at present unable to concur therein, to obviate which difficulty it is mutually agreed between the said (*vendor*) and (*purchaser*) that the said purchase-money, or sum of £ , shall be invested in some of the public stocks or funds, in the names of two trustees, one to be nominated by and on the behalf of the said (*vendor*), and the other to be nominated by and on the behalf of the said (*purchaser*), which said trustees shall from time to time, as the same shall become due, pay the interest, dividends, and annual produce of the said trust moneys, stocks, funds, and securities, unto the said (*vendor*), from the time the said (*purchaser*) is let into the possession and receipt of the rents and profits of the said premises, until the said A. B. shall attain his said age of twenty-one years, and duly execute the conveyance of the same; and when and as soon as the said A. B. shall have attained his said full age of twenty-one years, and duly execute the said conveyance of the said premises as aforesaid, the said trustees shall pay or assign all and singular the said trust moneys, stocks, funds, and securities, unto the said (*vendor*), his executors, administrators, or assigns; but in case the said A. B., on attaining his full age of twenty-one years, shall neglect or refuse to execute the said conveyance, or the said (*vendor*) shall be unable to obtain his concurrence therein, within the space of six calendar months next after the said A. B. so attaining his full age of twenty-one years as aforesaid; then the said trustees shall pay over or assign all and singular the said trust moneys, stocks, funds, and securities, unto the said (*purchaser*), his executors, administrators, and assigns.

*Precedents.*

Stipulation that purchase money shall be invested, to be repaid to the purchaser in case the contingency upon which the vendor's title depends should fail.

2. And whereas the said (*vendor*) is only entitled to an estate for life in the said advowson, so that the next presentation hereby contracted to be sold may altogether fail of effect by his death in the lifetime of the said (*incumbent*); to obviate which difficulty, as far as the nature of the circumstances will permit, it is mutually agreed between the said (*vendor*) and (*purchaser*), that the said purchase-money, or sum of £ , shall be invested in some of the public stocks or funds, in the names of two trustees; one to be nominated by and on the behalf of the said (*vendor*), and the other by and on the behalf of the said (*purchaser*), which said trustees shall stand possessed of the said stocks, funds, and securities, and shall receive the interest, dividends, and annual produce thereof, and invest the same in like manner, so that the same may accumulate in the nature of compound interest, until the avoidance of the said advowson by the decease, resignation, or deprivation of the said (*incumbent*), or the said next presentation so contracted to be sold to the said purchaser failing of effect by the death of the said (*vendor*), in the lifetime of the said incumbent. And upon the happening of the former event, the said trustees shall pay over the said trust moneys, stocks, funds, and securities, with all intermediate accumulations, unto the said (*vendor*), his executors, administrators, or assigns; but upon the happening of the latter event, the said trustees shall pay over the said trust moneys, stocks, funds, and securities, with all the intermediate accumulations, unto the said (*purchaser*), his executors, administrators, and assigns.

# No. IX.

## AGREEMENT FOR THE SALE OF AN ESTATE IN REVERSION.

1. Vendor agrees to sell.
2. To deliver an abstract.
3. On receiving purchase-money to convey.
4. Purchaser agrees to pay purchase-money.
5. Purchaser's solicitor to prepare conveyance; power for vendor to rescind sale in case purchase is not completed at the appointed time.
6. Liquidated damages clause.

[INSERT HEADING, *ut ante*, p. 117.]

Vendor agrees to sell.

1. The said (*vendor*), in consideration of the sum of £1,200 sterling, agrees to sell to the said (*purchaser*) all the remainder or reversion of him the said (*vendor*) expectant on the decease or sooner determination of the estate for life of A. B., &c, (*tenant for life*), of and in *all*, &c. [*Here describe parcels,*] but free from all other incumbrances.

To deliver an abstract.

2. Also that the said (*vendor*) will, at his own expense, within one calendar month from the date hereof, deliver an abstract of the said premises, and deduce a good title thereto, subject to the stipulations hereinafter mentioned.

On receiving purchase-money to convey.

3. Also, on or before the day of , on receiving from the said (*purchaser*) the said sum of £1,200, the said (*vendor*) will execute a proper conveyance for effectually conveying and assuring such remainder or reversion expectant as aforesaid, and all other necessary assurances unto the said (*purchaser*), his heirs and assigns, free from all incumbrances, and with the usual covenants for title and for further assurance.

Purchaser agrees to pay purchase money.

4. IN CONSIDERATION whereof the said (*purchaser*) doth hereby agree, upon the execution of such conveyances and assurances as aforesaid, to pay unto the said (*vendor*) the said sum of £1,200.

Purchaser's solicitor shall prepare conveyance; power for

5. And it is hereby mutually agreed between the said parties, that the said conveyances and assurances shall be prepared by the solicitor of and at the expense of the said (*purchaser*);

*Precedents.*

*Agreement for the sale of an estate in reversion.*

and in case such conveyances and assurances shall not be perfected for execution on the said day of , then and in such case the said (*vendor*) shall be at liberty to rescind the contract, *provided nevertheless*, that this right of rescinding the contract in the event aforesaid shall be wholly optional with the said (*vendor*), who may, if he thinks proper, still insist upon a specific performance thereof. *Provided always*, that any increase of value of the said premises by the decease of the said (*tenant for life*) between the date hereof and the time hereinbefore appointed for the completion of the said purchase, shall not in anywise vacate or prejudice this present contract, or entitle the said (*vendor*) to call for any increase of price on that account; and in like manner the said (*purchaser*) must bear the burden of all losses or damage which may from henceforth happen to the said premises by fire, inundation, tempest, or earthquake, or in any other manner howsoever.

vendor to rescind sale in case purchase is not completed at the appointed time; sale not to be vacated by increased value of property before time of completing purchase.

6. *And lastly*, that for the due performance of this agreement on their respective parts, each of them the said parties hereto bindeth himself, his heirs, executors, and administrators, unto the other of them, in the sum of £ , by way of liquidated damages, for the due and exact performance of the above agreement, and not by way of penalty. *In witness*, &c.

Liquidated damages clause.

# No. X.

## AGREEMENT FOR THE PURCHASE OF AN ADVOWSON.

1. Vendor agrees to sell.
2. To deliver abstract.
3. To convey on approval of title by vendee, on receipt of purchase-money.
4. Purchaser agrees to pay purchase-money.
5. Mutual agreements between vendor and purchaser.
6. Recitals contained in documents twenty years old to be sufficient evidence of facts recited.
7. That in case of avoidance previous to completion of purchase, vendor will appoint vendee's nominee.
8. That agreement shall not be affected by next avoidance devolving upon the crown.

[INSERT HEADING, *ut ante*, p. 117.]

1. The said (*vendor*) doth hereby agree with the said (*purchaser*) to sell to him the said (*purchaser*) *All* that advowson or perpetual right of patronage and presentation of and in the rectory or parish church of, &c., and also all glebe lands, &c., and the fee simple and inheritance thereof, free from incumbrances, for the price of £ . Vendor agrees to sell.

2. Also, that the said (*vendor*) will, at his own expense, within one calendar month from the date hereof, deliver a full and satisfactory abstract of the title of him the said (*vendor*) to the said advowson. To deliver abstract.

3. Also, that if the said (*purchaser*) shall approve of the said title, the said (*vendor*), and all necessary parties, will on the day of , now next ensuing, upon receiving from the said (*purchaser*) the said sum of £ , at the costs of the said (*purchaser*), as hereinafter mentioned, execute proper conveyances and assurances of the said advowson and premises unto the said (*purchaser*), his heirs and assigns, free from incumbrances, which said conveyance shall contain the usual and proper covenants for title, for quiet enjoyment, freedom from incumbrances, and for further assurance. (*a*) To convey upon approval of title by vendee, and on receipt of purchase-money.

(*a*) If the title deeds relate to other property of the vendor, insert clause 2, Prec. No. III.

*Precedents.*

*Agreement for the purchase of an advowson.*

4. In consideration whereof, the said (*purchaser*) doth hereby agree with the said (*vendor*) that he the said (*purchaser*), his heirs, executors, or administrators, will, on or before the day of , upon the execution of and perfecting such assurances as aforesaid, pay unto the said (*vendor*), his executors, administrators or assigns, the said purchase-money or sum of £ .

Purchaser agrees to pay purchase-money.

Mutual agreements between vendor and purchaser.

5. *And it is hereby mutually agreed* by and between the said (*vendor*) and (*purchaser*), [*Here insert clause that vendor shall defray the expenses of disentailing deeds, getting in outstanding legal estate, ut ante*, No II., clause 5.]

Recitals contained in documents twenty years, to be sufficient evidence of facts recited.

6. Also, that all recitals of descents, births, marriages and deaths, payments of money, heirships, intestacies, devises, vesting of terms of years, and all other facts of what nature or kind soever, contained in deeds or court-rolls or wills, twenty years old or upwards, shall be deemed sufficient evidence of those facts. [*Insert here that deed of conveyance is to be prepared by purchaser's solicitor, ut ante*, No. I., clause 7.]

That in case of avoidance previous to completion of purchase, vendor will appoint vendee's nominee.

7. That in case of the decease, cession, deprivation, or relinquishment of the present incumbent, previously to execution of the conveyance (otherwise than by the present or any succeeding incumbent being promoted to a bishopric), the said (*vendor*) shall duly present such person to the said advowson, as the said (*purchaser*) shall nominate and appoint.

That agreement shall not be affected by next avoidance devolving upon the crown.

8. And that in case the said presentation shall happen to devolve upon the crown, in consequence of the present or any succeeding incumbent being promoted to a bishopric, either before or after the said day of , this present agreement shall be in nowise affected thereby, nor shall the said (*purchaser*) be entitled to any deduction of price in consequence thereof. [*Here insert clauses for rescinding contract, ut ante*, No. I., clause 8.] *In witness*, &c.

## No. XI.

### AGREEMENT FOR THE SALE OF NEXT PRESENTATION TO A BENEFICE.

1. Vendor agrees to sell.
2. To convey on receipt of purchase-money.
3. That vendor will, at his own expense, furnish vendee with attested copies of title deeds, &c.
4. That agreement shall not be affected by next avoidance devolving upon the crown, nor vendee be entitled to any compensation.

[INSERT HEADING, *ut ante*, p. 117.]

1. The said (*vendor*) doth hereby agree to sell to the said (*purchaser*) for the sum of £ sterling, the first or next turn, right of nomination, presentation, and free disposition of and to the rectory (*a*) or parish church of C., in the county of D., whenever the same shall first become void by the death, resignation or deprivation of the now present incumbent, or by whatever other ways and means the said church shall become void. [*Here insert clause that vendor will deliver abstract, &c., as in clause* 2, *last Precedent.*] Vendor agrees to sell.

2. Also, that on receiving the said purchase-money or sum of £ , the said (*vendor*), and all other necessary parties, will execute a good and sufficient grant or other assurance, of the said first or next turn or right of nomination or presentation to the said rectory (*a*) or parish church, unto the said (*purchaser*), his executors, administrators or assigns, or otherwise as he or they shall direct or appoint; which said conveyance shall contain the usual and proper covenants for title, for quiet enjoyment, and for further assurance, and shall be prepared by and at the expense of the said (*purchaser*). To convey on receiving purchase-money.

3. That the said (*vendor*) will, at his own expense, on the execution of the said conveyance, deliver to the said (*purchaser*) Vendor, at his own expense, to furnish purchaser with attested

(*a*) If a vicarage, substitute "vicarage" for "rectory."

*Precedents.*

*Agreement for the sale of the next presentation to a benefice.*

copies, in consideration whereof purchaser agrees to purchase.

true and attested copies of all and every such title deeds and muniments of title relating to the said rectory (*a*) and parish church, and by the same conveyance to covenant for the production of the originals in the usual manner, as also to grant future copies, or extracts thereof. IN CONSIDERATION whereof the said (*purchaser*) agrees, upon the execution of the said conveyance, to pay to the said (*vendor*) the said sum of £ . [*Here insert clause for rescinding contract, ut ante*, No. I., clause 8.]

Agreement not to be affected by next presentation devolving upon the crown.

4. AND LASTLY, that if the now present, or any succeeding incumbent of the said rectory (*a*) shall, at any time hereafter during his incumbency, be promoted to a bishopric, and the right of presentation thereby devolve upon the crown [that circumstance shall not affect the present agreement, or entitle the said (*purchaser*) to call for any diminution of price or compensation; but, in such case, the said (*purchaser*) shall have the first or next turn or right of presentation to the said rectory after the crown]. (*b*) *In witness*, &c.

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(*a*) *Or* "vicarage."

(*b*) If it is intended that the purchaser shall receive compensation, then substitute for the words within brackets,

Purchaser to be entitled to compensation in case next presentation shall devolve upon the crown.

A. "Then and in such case the purchaser shall be entitled to a proportionate deduction of the purchase money, the amount of which shall be fixed by two indifferent persons, one to be chosen by the said (*vendor*), and the other by the said (*purchaser*), who, if they cannot agree, shall call in an umpire, whose determination shall be final; and in case either the said (*vendor*) or the said (*purchaser*) shall refuse or fail to name a referee, the determination of the referee appointed by the other party shall be final and conclusive on both parties."

## No. XII.

AGREEMENT FOR THE PURCHASE OF A CONTINGENT ESTATE IN REMAINDER, BEING A LIMITATION OVER BY WAY OF EXECUTORY DEVISE, HALF THE PURCHASE-MONEY TO BE PAID ON THE EXECUTION OF THE CONVEYANCE AND THE RESIDUE TO BE INVESTED IN THE FUNDS, TO BE PAID OVER TO VENDOR ON HIS ESTATE BECOMING ABSOLUTE, OR REPAID TO THE PURCHASER ON THE EXECUTORY DEVISE TAKING EFFECT.

[INSERT HEADING, *ut ante*, p. 117.]

1. Vendor agrees to sell.

2. On receiving one moiety of purchase-money, and on remainder being invested, vendor will convey, &c.

3. Purchaser agrees to pay moiety of purchase-money.

4. Mutual agreement between vendor and purchaser as to investment of remaining moiety of purchase-money.

1. The said (*vendor*), in consideration of the sum of £6,500 to be paid or secured in manner hereinafter mentioned, doth hereby agree to sell to the said (*purchaser*) all that contingent or executory remainder or reversion in fee, to take effect in possession upon the decease of R. S., the wife of J. S., in case of her death, without leaving any issue living at the time of her decease, of and in all, &c. [*Here describe parcels; insert clause that vendor will deliver abstract, &c., ut ante*, No. IX., clause 2.] Vendor agrees to sell.

2. Also, on or before the day of , the said (*vendor*), on receiving from the said (*purchaser*) the sum of £3,250, being one moiety of the said purchase money, and the said (*purchaser*) concurring with him as to the investment and application of the remainder thereof, he the said (*vendor*), and all other necessary parties, will execute a proper conveyance for conveying and assuring such remainder or reversion expectant and contingent as aforesaid, unto the said (*purchaser*), his heirs and assigns, free from all incumbrances and On receiving one moiety of purchase-money, and on remainder being invested, vendor will convey.

*Precedents.*

*Agreement for the purchase of a contingent estate in remainder, &c.*

executory limitations, except as aforesaid, with the usual covenants for title and for further assurance, such conveyance to be prepared by and at the costs of the said (*purchaser*).

Purchaser agrees to pay moiety of purchase-money.

3. In consideration whereof the said (*purchaser*) doth agree, upon the execution of such conveyance and assurance as aforesaid, to pay unto the said (*vendor*) the said sum of £3,250, and to enter into the stipulations and agreements respecting the remainder of the said purchase-money, as are hereinafter expressed and contained.

Mutual agreement between vendor and purchaser as to investment of remaining moiety of purchase-money.

4. *And it is hereby mutually agreed* by and between all the said parties hereto, that the sum of £3,250, the residue of the said purchase money or sum of £6,500, shall be invested in the £3 per cent. consols, in the names of two trustees, one to be appointed by the said (*vendor*), and the other to be appointed by the said (*purchaser*), who shall stand possessed of the same, *upon trust*, that in case the estate of the said (*vendor*) shall become absolute in the said premises, by the death of the said R. S., without leaving issue living at the time of her decease, to pay over or transfer the said stock, together with the dividends and intermediate accumulations unto or into the name of the said (*vendor*), his executors, administrators or assigns, or otherwise as he or they shall direct or appoint. And in case the said R. S. shall die and leave any issue living at the time of her decease, then to pay or transfer the said stock, interest, and dividends, unto the said (*purchaser*), his executors, administrators or assigns, or otherwise as he or they shall direct or appoint. [*Add clause that time shall form part of the essence of the contract, ut ante*, No. II., clause 8; If *liquidated damages are to be given, add also clause* 6, *ut ante*, No. IX., p. 138.] *In witness*, &c.

# No. XIII.

## AGREEMENT FOR THE PURCHASE OF TITHES.

1. Vendor agrees to sell, and vendee to purchase.

2. On payment of purchase-money purchaser shall be entitled to tithes.

[INSERT HEADING, *ut ante*, p. 117.]

1. The said (*vendor*), in consideration of £ to be paid by the said (*purchaser*), doth hereby agree to sell, and the said (*purchaser*) to purchase, all those the great or rectorial tithes or tenths of corn, grain, and hay, yearly arising, issuing, growing, increasing, and renewing out of and upon, or belonging to the rectory of B., in the county of C., and also all moduses, commutation of tithes, and also the yearly rent-charge or sum of £300, for which the said tithes, in pursuance of the acts for the commutation of tithes in England and Wales, have been commuted as a gross yearly rent-charge in lieu of the said tithes, with powers of distress and entry in case of nonpayment thereof. [*Here insert clause that vendor will furnish abstract, &c.; to execute conveyance on approval of title, &c.; also agreement from purchaser to pay purchase money, ut ante*, No. X., clauses 2, 3, 4.]

Vendor agrees to sell, and vendee to purchase.

2. That on payment of the said purchase-money, the said (*purchaser*) shall be entitled to the said rent-charge from the day of . [*Add clauses for rescinding contract, ut ante*, No. II., clause 8.]

On receipt of purchase money to convey, &c.

## No. XIV.

### AGREEMENT FOR THE ENFRANCHISEMENT OF COPYHOLDS.

1. Lord agrees to sell and enfranchise.

2. To deliver abstract.

3. If title is approved of, to convey to purchaser on receipt of purchase-money.

4. Lord to be at the expense of disentailing deeds, &c.

5. To retain title deeds, but to furnish attested copies at his own expense.

6. If purchaser objects to title, vendor to be at liberty to rescind the contract.

[INSERT HEADING, *ut ante*, p. 117.]

Lord agrees to sell and enfranchise.

1. The said (*lord*) doth hereby agree with the said (*copyholder*) to sell to him the freehold and inheritance in fee simple of and in all, &c. [*describe parcels*], with all commonable rights, privileges and appurtenances thereunto belonging, now held by the said (*copyholder*) for an estate of inheritance by copy of court-roll at the will of the lord, according to the custom of the said manor, enfranchised from all fines, heriots, fealty suits and services, for the price of £750.

To deliver abstract.

2. That the said (*lord*) will, at his own expense, within one calendar month from the date hereof, deliver a full and satisfactory abstract of the title of him the said (*lord*) to the fee simple and inheritance of the said manor.

If title is approved of, to convey to purchaser on receipt of purchase-money.

3. That if the solicitor of the said (*copyholder*) shall approve of the title, the said (*lord*), or his heirs, and all other necessary parties, will, on or before the day of , on receiving from the said (*copyholder*), his heirs, executors, administrators or assigns, the said purchase-money or sum of £ , execute a proper conveyance, and all other necessary assurances, for effectually conveying and assuring the fee-simple and inheritance of the said hereditaments and premises, with all rights, easements, privileges and appurtenances thereunto belonging, free from all incumbrances, and enfranchised as aforesaid, unto the said (*copy-*

*Precedents.*

*Agreement for the enfranchisement of copyholds.*

*holder*), his heirs and assigns, or to such uses and in such manner as he or they shall direct or appoint, such conveyance to be prepared by and at the expense of the said (*copyholder*). [*Insert here agreement by copyholder to pay purchase-money, ut ante*, No. X., clause 4.]

Lord to be at the expense of disentailing deeds, &c.

4. That (*lord*) will be at the expense of all disentailing deeds, as also of getting in outstanding estates, &c. [*Insert here clause that recitals of certain facts in ancient deeds shall be deemed sufficient evidence thereof for identity of parcels, ut ante*, No. II., clauses 4, 5, 6.]

To retain title deeds, but to furnish attested copies at his own expense.

5. That the said (*lord*) shall retain the title deeds and muniments of title relating to the said premises, but shall at his own expense, on the execution of the said conveyance, furnish the said (*copyholder*) with true and attested copies of all such title deeds and muniments of title, and also enter into the usual covenant for their production to the said (*copyholder*), his heirs or assigns, and to furnish attested or other copies, extracts, or abstracts; but such covenant to become void, in case the said (*lord*) should sell the said manor or any portion of the same, and deliver over the same title deeds and muniments of title to the purchaser thereof and procure such purchaser to enter into the same or the like covenants.

If purchaser objects to title, vendor to be at liberty to rescind the contract.

6. And lastly, that if the said (*copyholder*) shall make any objection to the title, the said (*lord*) shall be at liberty, if he shall think fit, by notice in writing under his hand, to annul the sale, and thereupon such sale shall become absolutely void, and the said (*copyholder*) shall be repaid all the reasonable costs expended by him in respect of such contract, and each contracting party shall be placed in the same situation as if no such contract had been ever entered into; unless the said (*copyholder*) shall, within the space of twenty-one days next after receiving notice from the said (*lord*), agree to accept the title unconditionally. *And* such right of the said (*lord*) to annul the sale as aforesaid shall not be considered to be waived, or in any manner affected by any negotiation as to any such objection or requisition, or any attempt or endeavour to obviate such objection or to remedy any defect that may be objected to. *In witness*, &c.

# CHAPTER II.

## CAPACITY OF CONTRACTING PARTIES.

### I. As to the Vendor.

1. *Joint Tenants.*
2. *Mental Capacity.*
3. *Infants.*
4. *Married Women.*
5. *Tenants in Tail.*
6. *Tenants for Life.*
7. *Tenants pur autre Vie.*
8. *Tenants for Years.*
9. *Copyholders and Tenants of Customary Estates.*
10. *Bankrupts and their Assignees.*
11. *Corporations.*
12. *Traitors and Felons.*
13. *Aliens.*
14. *Mortgagee.*
15. *Trustees.*
16. *Cestuis que trust.*
17. *Persons who have already parted with their Estates.*
18. *Donees of Powers.*
19. *Executors and Administrators.*
20. *Sheriff.*
21. *Of Voluntary or Fraudulent Conveyances.*

### II. As to the Purchaser.

1. *Of Voidable Purchases.*
2. *Persons capable of purchasing, and yet incapable of holding.*
3. *Persons totally disabled from purchasing.*

CHAP. II. *Capacity of contracting parties.*

WITH very few exceptions, all persons of full age, and not labouring under legal disabilities, are capable of entering into a contract for the sale or purchase of real property, which will in most instances not only be binding upon themselves, but upon their representatives also. A tenant in tail, however, forms an exception to the latter rule, as his contract, although it may be enforced against himself, cannot be so against the issue in tail, much less against the remainderman or reversioner, because the latter claims *per formam doni*, and not through the tenant in tail: (3 Rep. 41, b.; *Cavendish* v. *Worsley*, Hob. 203; *Ross* v. *Ross*, 1 Cha. Cas. 161; *Herbert* v. *Frean*, 2 Eq. Ca. Abr. 28, pl. 34; *Kirham* v. *Smith*, Ambl. 518; S. C. 1 Ves. 260; *Hinton* v. *Hinton*, 1 Ves. sen. 632, 634; *Burnaby* v. *Griffin*, 3 Ves. 277; *Fletcher* v. *Tollet*, 5 ib. 13; see also *Weale* v. *Lower*, 1 Eq. Ca. Abr. 266.) Nor has the recent Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) made any alteration in the law in this respect; for it draws a clear distinction between contracts to sell entered into by tenants in tail, and actual assurances made by them under the provisions of that act, and expressly provides that no disposition by a tenant in tail shall be of any force unless evidenced by deed; and no disposition *resting only in contract* shall be of any force notwithstanding it shall be made or evidenced by deed. (Sect. 40.) But notwithstanding that a contract by a tenant in tail will not bar the entail, or pass any actual interest in the land itself to the purchaser, still, the tenant in tail himself is personally bound by such contract, and a court of equity will compel him to carry it into effect by decreeing a specific performance (stat. 1 Will. 4, c. 36, s. 14, rule 15; *Horcliff* v. *Warsley*, 1 Cha. Cas. 234; *Sayle* v. *Freeland*, 2 Ventr. 320; *Legate* v. *Sewell*, 1 P. Wms. 91; *Radford* v. *Wilson*, 3

Atk. 815; *Boteler* v. *Allington*, 1 Bro. C. C. 72); and now under a rule (15) framed in pursuance of the statute 1 Will. 4, c. 36, the court is empowered to execute a decree against a tenant in tail, who is in prison for contempt for refusing to convey in pursuance of such contract. But a contract of this kind, if only partially carried into effect, must fail of effect if the tenant in tail should happen to die before it is completed. As a general rule, however, a person may dispose of an interest at least commensurate in point of duration with the estate which he himself takes in the premises. Thus, a tenant in fee-simple absolute may convey that, or any lesser estate he may think proper. If he has only a base fee, he may convey any estate commensurate with such base fee. Joint tenants, tenants in common, and coparceners, may also convey their estates to a purchaser, with this only difference, that where a joint tenant conveys away his interest to a third party, the jointure is thereby severed, so that the purchaser and the other joint tenant will hold the lands as tenants in common: (Litt. s. 292; 2 Blac. Com. 185; *York* v. *Stone*, 1 Eq. Ca. Abr. 293; S. C. 1 Salk. 158; *Sym's case*, Cro. Eliz. 33; Co. Litt. 192, a; *Clark* v. *Turner*, 2 Vern. 323.) A tenant for his own life, or the life of another, may pass that estate, or he may create any lesser interest, not exceeding in point of duration that which he himself takes in the land. A lessee for years may either assign his whole term, or grant an under-lease; and a copyholder may transfer his copyhold estates. A tenant in tail can, however, under certain circumstances, dispose of even a larger estate than he himself takes in the premises; for if there be no protector of the settlement (or if there be, and he can procure such protector's consent), he may, by adopting the proper mode

of assurance, pass an estate not merely determinable with his estate tail, but an estate in fee-simple absolute, discharged of all estates, rights, titles, interests, and powers, to take effect after the determination, or in defeasance of, such estate tail. Nor is it in all cases necessary, to enable a party to convey, that he should take any actual estate or interest in the land; for he may sell under a mere naked authority; as where executors sell under a power of sale contained in a will.

Persons taking only limited interest may have an absolute power of disposition.

Persons taking limited interests also may have an absolute power of disposition conferred upon them, as a tenant for life or years with a power of appointment over the whole fee; and there are instances in which, notwithstanding a person may have disposed of all his estate, both legal and equitable, in the premises, he may still retain both a selling and a conveying power; as where a man makes a post-nuptial settlement, conveying the entire fee to trustees upon trust for his wife and children; which conveyance, notwithstanding it passes both his legal and equitable estate in the premises, does not deprive the settlor of the power to sell and convey the property to a purchaser for valuable consideration; and a conveyance so made will be as effectual, both to the legal and equitable estate, as if the trustees to whom it had been previously conveyed, and every person claiming or entitled under it, had concurred therein. Nor will the circumstance of the purchaser's having express notice of the prior voluntary settlement at all tend to invalidate the conveyance: (Stat. 27 Eliz. c. 4; *Gooch's case*, 5 Co. 60, a; *Evelyn* v. *Templar*, 2 W. Bla. 1019; *Goodsight* v. *Moses*, 2 Bro. C. C. 148; *Doe* v. *Manning*, 9 East, 59; *Doe* v. *Hopkins*, ib. 70; *Hill* v. *Bishop of Exeter*, 2 Taunt. 69; *Doe* v. *Botriell*, 5 B. & A. 131; *Gully* v. *Bishop of Exeter*, 10 B. & C.

601; *Buckle* v. *Mitchell*, 18 Ves. 110; *Metcalfe* v. *Pulvertoft*, ib. 183; see also 1 Mad. Pract. 272, 2nd ed.; *Currie* v. *Nind*, 1 Myl. & Cra. 17.)

Right of possession formerly inalienable.

Formerly a person who had nothing beyond a mere right of possession or property was disabled from conveying it, upon the ground that thereby pretended titles might be granted to monied men, and so cause strife and litigation (Co. Litt. 214; *Chesterfield* v. *Jansen*, 1 Atk. 301, 3 Bla. Com. 290), whereby justice might be trodden down, and the weak oppressed. Still this did not affect the sale of estates in remainder or reversion; and even contingencies and mere possibilities might have been released. And notwithstanding that such rights could not at law (unless coupled with an interest) have been conveyed or assigned over to a stranger (Shep. Touch. 238; *Arthur* v. *Bokenham*, 11 Mod. 152; *Wright* v. *Wright*, 1 Ves. 411), yet they were assignable in equity; and even at law the assignor would have been bound by estoppel; for which purpose a fine was at one time generally used, though it was afterwards determined that a deed was sufficient.

Executory interests rendered alienable by statute 8 & 9 Vict. c. 106.

Thus the law stood until the passing of the act 7 & 8 Vict. c. 76, which, amongst other things, enacted "that any person might convey, by deed, any such executory interest, right of entry for condition broken, or future estate or interest, as he should be entitled to, or presumptively entitled to, in any freehold, copyhold, or leasehold land or personal property, or any part of such interest, right, or estate respectively." This statute was, however, repealed by an act passed in the following session (8 & 9 Vict. c. 106); but by the 5th section of the latter statute it is enacted, that after the first day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest in any tenements or heredita-

CHAP. II.

*Capacity of contracting parties.*

ments, of any tenure, whether the said object of the gift or limitation, or such interest or possibility, be or be not ascertained ; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any lands or hereditaments in England, or of any tenure, may be disposed of by deed ; but that no disposition shall by force only of this act defeat or enlarge an estate tail ; and that every disposition by a married woman shall be made conformably to the provisions of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74, s. 1.)

## SECTION I.

### AS TO THE VENDOR.

1. *Joint Tenants.*
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5. *Tenants in Tail.*
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### 1. *Joint Tenants.*

Joint tenants.

NOTWITHSTANDING that the right of survivorship is one of the properties incidental to an estate in joint tenancy, this right may, nevertheless, be defeated by an alienation to a stranger, which, by destroying the unity of both, severs

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the joint tenancy and turns it into a tenancy in common (Litt. s. 292; 2 Blac. Com. 185; 8 Rep. 43, a); but in order to accomplish this, so as to affect the legal estate in the lands, the severance must be made by an actual conveyance; yet in equity—notwithstanding a different opinion formerly prevailed (*Musgrave* v. *Dashwood*, 2 Vern. 45, 63)—a mere contract to sell will sever the joint tenancy: (*Partericlie* v. *Powlett*, 3 Atk. 54; 2 Ves. 634; *Brown* v. *Raindle*, 3 Ves. 256.)

When an estate in joint tenancy will survive at law.

And there are instances where, though an estate in joint tenancy will survive at law, it will not do so in equity, even although no act be done to sever it; as, for example, where two persons purchase lands which are conveyed to them as joint tenants, one of whom pays more money than the other, in which case a court of equity will not permit the survivor to take the beneficial interest in the premises, but simply the dry legal estate of his deceased co-tenant: (*Lake* v. *Gibson*, 1 Eq. Ca. Abr. 291; *Petty* v. *Styward*, 1 Ch. Rep. 31.) The same rule of equity will also prevail where lands are purchased for the purpose of carrying on a joint undertaking, as for the erection of buildings or improvements, or for the purpose of carrying on a trade. Upon the latter principle, therefore, a new lease obtained by one partner of premises connected with the partnership business will enure for the benefit of both, although the partner who obtains it does so clandestinely and solely upon his own account; and upon a like principle, where one joint tenant expends money to any amount in repairs, or in obtaining the renewal of a lease, or in any way expends money in the necessary improvement of the joint property, it will give him a lien upon the land, which will survive to his representatives, for whom the surviving joint tenant will hold the land as a trustee.

## 2. *Mental Capacity.*



Mental capacity.

Mental capacity in the parties is requisite to the validity of every legal instrument; consequently, idiots and madmen are disabled from entering into a contract (Co. Litt. 247, a); and after a lunatic is so found by inquisition, his committee may vacate the agreement and avoid all his acts during the time he has been found to have been of unsound mind (*Clerk by Committee* v. *Clerk*, 2 Vern. 412; *Addison by Committee* v. *Dawson*, *ib.* 678; *Ridler by Committee* v. *Ridler*, 1 Eq. Ca. Abr. 279), as may also his heir after his death. This the latter may do either by entry or ejectment. But the committee of a lunatic cannot maintain ejectment; their only remedy is through the medium of the Court of Chancery. It has, indeed, been laid down in books of high legal authority, that the lunatic himself, in case he should recover his senses, cannot avoid acts done by him during his insanity, upon the ground that no man shall be allowed to stultify himself or plead his own disability (39 Hen. 6, 42; Co. Litt. 247, a; *Stroud* v. *Marshall*, Cro. Eliz. 398); and notwithstanding the principles upon which courts of equity generally relieve appear to entitle the lunatic to relief, there does not appear to be a single case in which the plea of *non compos* by the party himself before inquisition has been allowed. In one case, indeed (*Bonner* v. *Thwaites*, Toth. 130), it is said, the Court of Chancery will not retain a bill to examine the point of lunacy. But the strictness of this rule is now in some degree relaxed; so that even in a court of law, although a defendant has not been allowed to put in a plea of *dum non fuit compos mentis*, yet where an action has been brought upon an instrument executed by him whilst he was out of his senses, he has been permitted to plead *non*

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*est factum* to the instrument, and to give the insanity in evidence in support of that plea (*Yates* v. *Boen*, Str. 1104; *Smith* v. *Carr*, referred to in 1 Fonbl. Eq. 49, n. *d.*; *Bagster* v. *Earl of Portsmouth*, 5 B. & C. 170); and it seems monstrous to suppose that a court of equity would refuse to interfere to relieve a party from a contract entered into by him whilst in a state of insanity, particularly if the other party was aware of the lunatic's state of mind at the time, which is a far stronger case than drunkenness, the latter of which a court of equity has permitted to be set up as a defence against a specific performance (*Rich* v. *Sydenham*, 1 Cha. Cas. 202; *Johnston* v. *Medlicott*, 3 P. Wms. 130, n. *a*), even though the defendant was not drawn into drink by the plaintiff: (*Cragg* v. *Holme*, mentioned in a note to *Cooke* v. *Clayworth*, 18 Ves. 14; *Spiers* v. *Higgons*, cited 1 Mad. Pr. 303, 2nd edit.; *Cole* v. *Robins*, Bull. N. P. 172; *Pitt* v. *Smith*, 3 Camp. N. P. C. 33; *Fenton* v. *Holloway*, 1 Stark. N. P. C. 126; *Gore* v. *Gibson*, 13 Mee. & Wels. 623.) But equity will interfere no further, where the defendant sets up drunkenness as his defence, than by denying to enforce a specific performance of an agreement obtained under those circumstances; consequently, the court will not decree the agreement to be delivered up, but will leave the parties to their remedy at law. And a very strong case must be made out, before a court of equity will allow drunkenness to prevail as a defence against the specific performance of a contract; for even if the transaction were entered into whilst the party was intoxicated, still, if it can be shown that he understood the nature of it, and that no unfair advantage was taken of his situation, the agreement would nevertheless be enforced: (*Cory* v. *Cory*, 1 Ves. 19; Ersk. Inst. 447; Heineccius, lib. c. 14, s. 392; Puffendorff, lib. 1, c. 4,

s. 8; Pothier *Traité des Obligations*, p. 1, ch. 1, s. 1, art. 4.) But it seems that, even at law, where the party had been drawn into drink by the connivance of the plaintiff, and in that state had been induced to execute a legal instrument upon which an action is brought, he may allege his drunkenness and the fraud practised upon him by the plaintiff, as a defence to such action: (*Cole* v. *Robins*, Bull. N. P. 172; *Pitt* v. *Smith*, 3 Camp. N. P. C. 33; *Sentance* v. *Poole*, 3 Car. & Pay. 1; *Brandon* v. *Old*, ib. 440; *Fenton* v. *Holloway*, 1 Stark. 126.)

Lunatic may enter into contracts during a lucid interval.

It is only whilst a lunatic is labouring under derangement that he is incapacitated from entering into a contract; for during his lucid intervals his legal capacity is restored, and he again becomes capable of performing acts binding both upon himself and his representatives, which no subsequent recurrence of the disorder can invalidate. (Swin. 72.) Even the fact of a person being confined in a madhouse will not necessarily invalidate an instrument executed by him during a lucid interval, if the latter fact can be clearly shown; as in the case mentioned by Lord Eldon in *McAdam* v. *Walker* (1 Dow. 179), in which his lordship said he had been concerned, where a gentleman who had been some time insane, and was confined at Richmond, made a will. It was of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he had declared before his malady he intended to have done. And it was held that he was of sound mind at the time and, consequently, that the will was valid. Nice questions have, therefore, often arisen as to what will amount to such a remission, or intermission, of the disorder of insanity as to constitute a lucid interval; a subject upon which it is impossible

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to lay down any fixed or general rules, as each particular case must ever depend upon its own individual circumstances. (*Neill* v. *Morley*, 9 Ves. 478 ; *Hall* v. *Warren*, ib. 605 ; *Cartwright* v. *Cartwright*, 1 Phill. 100.) It has, indeed, been said that when the fact of lunacy was once established by clear evidence, the fact that the party is restored to as perfect a state of mind as he previously possessed, should be proved by evidence equally clear and satisfactory: (3 Bro. C. C. 444, in a note to *Attorney-General* v. *Parnther*.) But this is not the law now. (*Ex parte Holyland*, 11 Ves. 10 ; *White* v. *Wilson*, 13 Ves. 89.) And, in several modern cases, the acts of parties who once laboured under insanity have been held valid, notwithstanding they were not restored to quite as perfect a state of mind as they had previously enjoyed. (See 1 Dowl. 179 ; *Neill* v. *Morley*, 9 Ves. 478 ; *Hall* v. *Warren*, ib. 605 ; *Ex parte Holyland*, 11 Ves. 10 ; *White* v. *Wilson*, 13 Ves. 87 ; *White* v. *Driver*, 1 Phill. 84 ; *Cartwright* v. *Cartwright*, ib. 100.) For the memory which the law considers as a sound memory is where a person has a sufficient understanding to dispose of or manage his property with judgment and discretion, which must be collected from his actions, words and behaviour at the time. Still it will not be sufficient to show that the lunatic has done an act a man in his senses might have done, as that may happen in many ways ; it must be shown that the act proceeded from judgment and deliberation, otherwise the presumption of lunacy continues. (Co. Litt. 246, n. 1.) The evidence ought to go to the state and habits of the lunatic (*Levy* v. *Lindo*, 3 Mer. 85), and not rest merely upon an accidental interview with an individual, an occasional instance of self-possession, or his giving a plain answer to a common question. It is re-

quisite to show sanity and competence at the time of the act to which the lucid interval refers (*White* v. *Wilson*, 13 Ves. 88); for it would be going much too far to infer from circumstances too trivial in themselves to mark that restoration of mind which is requisite to enable a person to manage his affairs, a conclusion so general as that a person who has been clearly proved insane has so far recovered the use of his reason as to be capable of performing acts binding upon himself and others. And notwithstanding a lunatic may dispose of his property during a lucid interval, still a title received through a person in such circumstances should be received with great caution, as it will be incumbent upon the person claiming under any assurance by the lunatic to show that such assurance was executed during a lucid interval. (See *Attorney-General* v. *Parnther*, 3 Bro. C. C. 441; *Hall* v. *Warren*, 6 Ves. 605; see also 1 Prest. Abs. 331.)

Lunatics may in certain instances be bound by the acts of other parties.

Although a lunatic cannot, whilst he continues such, bind himself by an agreement, yet, like an infant, he may in certain instances be bound by the acts of other parties; as, for instance, where a contract has been entered into by the ancestor of a lunatic, the former of whom dies without having completed it, or where the legal estate is outstanding in a lunatic. Until recently, however (see stats. 4 Geo. 2, c. 10; 43 Geo. 3, c. 75), lunatics could not have conveyed unless a commission had been previously taken out; but now, under the late stat. 4 Will. 4, c. 60, they are empowered to convey though not so found by inquisition, so that now no objection can be taken to a title upon the ground that the legal estate is outstanding in a lunatic.

Fine and recoveries levied or suffered by lunatics cannot after-

If fines or recoveries have been levied or suffered by an idiot or lunatic in person, they cannot be impeached (*Mansfield's case*, 12 Rep. 124; *Hugh Lewin's case*, 10 ib. 42; 1 Prest.

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wards be impeached.

Abs. 331); but it will be otherwise if the tenant to the *præcipe* be made by deed (3 Atk. 312 ; 2 Ves. 403) ; or if the party appear by attorney; because, being *non compos mentis*, he is incapable of appointing an attorney : (12 Rep. 124 ; Collinson on Idiots and Lun. 413, *et seq.* ; see also Co. Litt. 247 ; 2 Blac. Com. 335 ; Prest. Shep. Touch. 21, n. 100.) And notwithstanding the fine or recovery of a *non compos* will, generally speaking, be as effectual in equity as at law, still, where any fraud has been practised (*Rushley* v. *Mansfield*, Toth. 42 ; *Wright* v. *Booth*, ib. 166; *Coleby* v. *Smith*, 1 Vern. 205 ; *Addison* v. *Mascal*, 2 ib. 678) or those assurances have been obtained by any undue means, though a court of equity will not absolutely set them aside, it will nevertheless relieve the injured party by treating those who have taken under those assurances in the light of trustees, and decree them to reconvey the estate to the parties prejudiced by the fraud. (*Day* v. *Hungat*, 1 Roll. Rep. 115 ; see also Vern. 307 ; 1 Ves. 289 ; *Clark* v. *Ward*, Pre. Cha. 150 ; Co. Litt. 365, n. 17 ; 1 Fonbl. Eq. 53, n. *k*.)

Persons of weak intellects, how far capable of entering into contracts.

With respect to persons of weak intellects, but not actually insane, there is nothing to prevent their entering into contracts which will not be relieved against even in equity, unless some kind of fraud has been practised upon them. (*Osmond* v. *Fitzroy*, 3 P. Wms. 129.)

### 3. *Infants.*

Infants are disabled from entering into contracts.

If an infant enter into a contract for the sale or purchase of an estate, he can neither enforce a specific performance, nor can it be enforced against him ; for courts of equity, acting merely upon equitable principles, will not lend their aid where the remedy is not mutual ; and as a specific performance could not be decreed against an infant, it shall not be enforced at his suit :

(*Flight* v. *Bolland*, 4 Russ. 298 ; see also *Howell* v. *George*, 1 Mad. Rep. 1 ; *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13.) Yet if he contracts to buy an estate and pay a deposit, he cannot, in the absence of fraud, recover it back, because he declines to complete the purchase ; although it would be otherwise if he could show that any fraud has been practised upon him : (*Capes* v. *Hutton*, 2 Russ. 357 ; *Wilson* v. *Keane*, Peake Add. Cas. 196.)

How far a contract entered into by an infant may be confirmed by him on his attaining his majority.

A contract of an infant may be confirmed by him after he attains his majority, and which, if once done, cannot afterwards be avoided by him ; for all such acts and deeds of an infant as are merely voidable may be ratified by him when he comes of age : (Bac. Abr. Infancy, c. 3 ; 1 Woodes. Vin. Lect. 400 ; *Zouch* v. *Parsons*, 3 Bur. 1805 ; *Gibbs* v. *Merrell*, 3 Taunt. 313 ; *Goode* v. *Harrison*, 5 B. & Ald. 159 ; *R.* v. *Inhabitants of Chillingworth*, 4 B. & C. 100.) Consequently, if an infant makes a lease rendering rent, and accept rent after he is of full age, he cannot afterwards avoid the lease : (*Ashfield* v. *Ashfield*, Sir W. Jones, 157 ; *Clayton* v. *Ashdown*, 9 Vin. Abr. 393, pl. 4.)

Infant may confirm a lease granted by him during his minority.

So where an infant, on coming of age, mortgaged his property to a lessee by deed, reciting the lease granted during his nonage, it was held to have confirmed the lease. (*Story* v. *Johnson*, Exch. June 26, July 5, 2 You. & Coll. 586). And if a person continues in possession (without objection) after his full age of premises leased to him during his infancy, such continuance will be construed as a ratification of the lease, and render him liable even for the arrears of rent which accrued during his minority : (1 Roll. Abr. Enfants (K), 731 ; *Ketsey's case*, Cro. Jac. 320 ; *Kirton* v. *Elliott*, 2 Bulstr. 69 ; *Evelyn* v. *Chichester*, 3 Burr. 1719 ; *Baylis* v. *Dineley*, 3 M. & S. 480 ; *Holmes* v. *Blogg*, 8 Taunt. 35 ;

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2 Steph. N. P. 2962 ; Chitt. Cont. 153 ; see also 2 Co. Litt. 172, 308 ; 1 Roll. Abr. 731 ; Godb. 363 ; *Franklin* v. *Thornbury*, 1 Vern. 132.) But by the statute 7 Geo. 3, c. 26, s. 6, all contracts for the purchase of annuities with any person under twenty-one years of age are declared to be void ; and the persons who shall procure or solicit the grant of any annuity, &c. from any minor, are made liable to punishment by fine and imprisonment.

How far an infant may be bound by the acts of others.

But notwithstanding an infant will not be compelled to perform specifically any agreement entered into by him respecting his real estate during his minority, yet there are cases in which he will be bound by the acts of others ; as in the case of an infant heir or devisee, who will become bound by the acts of his ancestor or testator ; as will also the infant heirs of trustees and mortgagees. As to the statutes enabling infant mortgagees and trustees to convey, see *infra* 13, under the head of Trustees.

### 4. *Married Women.*

Married women incapacitated from entering into contracts.

A married woman is disabled from entering into a contract relating to her real estate during her coverture, without her husband's concurrence; and even with such concurrence she can only convey her estate or interest by adopting certain modes of assurance, enacted by the legislature for that express purpose. The way by which this was formerly effected was by fine or recovery, though more frequently by the former. But fines and recoveries have been lately abolished by the statute 3 & 4 Will. 4, c. 27, which substitutes a more simple mode of assurance in their stead, and by which every married woman, not being tenant in tail, is enabled by deed to dispose of or release any estate on her lands, which she alone, or she and her husband in her right, may have therein. (Sects. 40, 77.) But to render

such an assurance valid, it is necessary, not only that both husband and wife should concur therein (*ib.*), but also that she should be examined separate and apart from her husband, before a judge or master in Chancery, or by the commissioners appointed under the act, as to her freedom and consent (sects. 77, 79); in addition to which, the deed must be duly acknowledged according to the terms prescribed by the act. (Sect. 80.) This act does not, however, extend to lands held by copy of court roll, to which a married woman, or her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel. (Sect. 77.) And where a disposition is made under this act by a married woman tenant in tail (sect. 40), or protector of a settlement, it must be enrolled like other disentailing deeds. (Sect. 41.) But the Court of Common Pleas is empowered to dispense with the husband's concurrence where he has become insane, or is living separate from her, in any case in which his concurrence is required by the act; but without prejudice to the rights of the husband existing independently of this act. (Sect. 91.)

Married women may convey under a power of appointment.

Under a power of appointment, a married woman may convey, without her husband's concurrence, in the same manner as if she were sole (*Harris* v. *Graham*, 1 Roll. Abr. 329, pl. 12; 2 ib. 247, pl. 6; *Gibbons* v. *Moulton*, Finch. 346; *Daniel* v. *Upley*, Latch. 39; Godb. 327; pl. 419; *Bayley* v. *Warburton*, 2 Com. 494; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Peacocke* v. *Moncke*, 2 ib. 190; *Allen* v. *Papworth*, 1 Ves. sen. 163; *Grigby* v. *Cox*, ib. 517); and it is immaterial whether the power be given to

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a *feme sole*, and she afterwards marries (*Gibbons* v. *Moulton*, Finch. 346; *Churchill* v. *Dibben*, 2 Ed. 252), or to a woman who is married, and afterwards becoming a widow marries again (*Bayley* v. *Warburton*, 2 Com. 494); as in both instances she may execute the power without her husband's concurrence; nor has the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) at all restricted her disposing power in this respect. The act, in fact, provides in express terms that any power of disposition thereby given to a married woman shall not interfere with any power which, independently of this act, may be vested in her, so as to prevent her exercising such power, except so far as by any disposition made under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition. (Sect. 78.) But notwithstanding that a power of appointment will enable a married woman to convey away her estate in the same manner as if she were sole, it will not empower her, without her husband's concurrence, no, not even in equity, to enter into any contract respecting it; the reason of which is, that a power of appointment can only be executed by pursuing the precise terms prescribed by the instrument by which such power was created, and consequently cannot include a mere agreement to sell, which is, in fact, a mere contract by a married woman, who, as such, is incapable of becoming a contracting party; and although she can convey, in pursuance of a power of appointment, without her husband's concurrence, it is exceedingly doubtful whether she can convey lands which she holds as trustee, without his joining in the conveyance. Mr. Preston says that the better opinion, sanctioned by uniform practice, is, that as to estates of freehold which a married woman has as a trustee,

no effectual conveyance can be made by her alone, and therefore she and her husband used to convey by fine or recovery. (1 Prest. Abs. 337.) The same object may be now effected by an assurance under the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74, sects. 40, 77, 78, 80).

Power of husband over his wife's property.

The next subject for our consideration will be the power or control which a husband has over his wife's real property ; as also the extent of his power of disposition over the same.

Husband's power of alienation over wife's lands.

Where a married woman is entitled to freehold land, either in fee simple, fee tail, or for life, the husband and wife are seised of the same in right of the wife, which confers a sufficient estate upon the husband to empower him to convey the whole of his wife's interest, subject only to her right of entry, until which time her estate will be in the alienee of the husband. (1 Inst. 351, *a* ; 273, *b* ; 326, *b* in note ; *Polyblank* v. *Hawkins*, Doug. 329 ; *Took* v. *Glasscock*, 1 Saund. 250, 253 ; *Catlin* v. *Milner*, 2 Lutw. 1421, 1425.) But he is unable, either by contract or conveyance, to alienate her lands without her consent and concurrence, so as either to be binding upon herself or her representatives. (*Daniel* v. *Adams*, Amb. 495 ; *Emery* v. *Wase*, 5 Ves. 846.) Cases have, however, occurred in which a husband, having entered into an agreement for the sale of his wife's property, has been compelled to obtain her concurrence (*Hall* v. *Hardy*, 3 P. Wms. 187 ; *Barrington* v. *Horne*, 2 Eq. Ca. Abr. 17, pl. 7 ; *Morris* v. *Stevenson*, 7 Ves. 474 ; *Wheeler* v. *Newton*, Pre. Cha. 16 ; *Haddon's case*, Toth. 205 ; *Griffin* v. *Taylor*, ib. 106 ; see also *Withers* v. *Pinchard*, ib. 175, cited ; *Costigan* v. *Hastler*, 10 Ves. 505 ; see also *Rust* v. *Whittle*, Toth. 94 ; *Griffin* v. *Taylor*, ib. 106 ; *Berry* v. *Wade*, Finch. 180 ; *Winter* v. *D'Evreux*, 2 P.

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Wms. 189, n. *b*); and there have been instances of committing him to prison till such concurrence was obtained. But a practice so utterly at variance with the principle that a married woman shall in nowise be compelled to alienate her lands has been since highly disapproved of; and Mansfield, C. J. once observed that "nothing can be more absurd than to allow a wife to be compelled to levy a fine through the fear of her husband's being sued and thrown into gaol, when the general principle of law is, that a married woman shall not be compelled to levy a fine." (*Davis* v. *Jones*, 2 B. & P. New Rep. 269; *Martin* v. *Mitchell*, 2 Jac. & Walk. 425.) Sir Thomas Plumer, also, in *Howell* v. *George* (1 Mad. 7), highly disapproved of the practice of compelling the husband to procure his wife's concurrence; as did also Lord Eldon, in *Emery* v. *Wase* (8 Ves. 505), in which latter case he said "there was quite difficulty enough to make him pause before he should adopt it." (See also *Mortlock* v. *Buller*, 10 Ves. 305; *Cooth* v. *Jackson*, 16 ib. 367.) Upon the whole, therefore, it appears that if it can be made clear that the husband really is unable to procure his wife's concurrence, the court would not decree an impossibility; especially if the husband were to offer to return all the money with interest and costs, and to answer all damages incurred by the purchaser in respect of the contract. (3 P. Wms. 190, in a note to *Hall* v. *Hardy*; see also *Outread* v. *Round*, 4 Vin. Abr. 403, pl. 4; *Daniel* v. *Adams*, Ambl. 495; *Emery* v. *Wase*, 5 Ves. 848; *Morris* v. *Stevenson*, 7 ib. 478.)

As to leasehold property of the wife.

With respect to the wife's leasehold property, unless settled upon her previously to her marriage, her husband will have an absolute power of disposition over it, and may, therefore, without her concurrence, bind her by his contract; which, though she survive him, she will,

nevertheless be decreed to perform specifically: (*Steed* v. *Cragh*, 9 Mod. 43).

As to her dower.

As the husband was disabled from binding his wife by any contract respecting her freehold lands, so, in like manner was he unable, without such consent, to deprive her of her dower by an alienation of the lands upon which such right of dower had once attached; and so the law still remains with respect to husbands married prior to 1834; but those married subsequently, are, by the late Dower Act (stat. 3 & 4 Will. 4, c. 105), empowered either by deed, will, *or contract*, to debar their wives of their right to dower. (Sects. 6, 7.)

As to her freebench.

The husband might, even before the Dower Act above referred to (3 & 4 Will. 4, c. 105), have defeated his wife's freebench, either by a contract or an actual surrender, a widow of a copyholder being only entitled to her freebench out of the lands her husband actually died possessed of (*Benson* v. *Scott*, Carth. 275; *Hinton* v. *Hinton*, 2 Ves. sen. 631; *Goodwin* v. *Winsmore*, 2 Atk. 526; *Rex.* v. *Inhabitants of Lopen*, 2 T. R. 580; *Brown* v. *Raindle*, 8 Ves. 256; 2 Wat. Cop. 74); and his power of alienation is, in this respect, unaffected by any subsequent enactment.

By what mode of assurance married woman may convey her entailed lands.

Where a married woman is tenant in tail, she may, with the concurrence of her husband, and provided the deed be duly acknowledged by her, confer as valid a title as an ordinary tenant in tail can do. The power of a tenant in tail to bar his estate and execute a conveyance to a purchaser will be fully treated of when we come to treat of contracts entered into by tenants in tail.

Acknowledgments by married women.

With respect to acknowledgments by married women, the 37th section of the statute 3 & 4 Will. 4, c. 74, enables every married woman, unless she be tenant in tail, to dispose of lands

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by deed ; but her husband must concur in such deed, and it must be acknowledged by her.

As to the powers of a married woman as protector of a settlement.

The powers of a married woman as the protector of a settlement under the provisions of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), will be treated of hereafter, when considering the dispositions which tenants in tail are empowered to make under the provisions of this act.

Operation of the late Real Property Act.

The 6th section of the recent statute 8 & 9 Vict. c. 106, enacts that every disposition by a married woman shall be made conformably to the provisions of the statute 3 & 4 Will. 4, c. 74, above cited, and by a subsequent section (sect. 7), married women are empowered, after the 1st of October, 1845, by a deed made conformably to the said act of the 3 & 4 Will. 4, c. 74, to disclaim any estate or interest in any tenements or hereditaments.

### 5. *Tenants in Tail.*

Tenants in tail empowered to dispose of entailed estates by means of fines and recoveries.

The restrictions imposed by the statute *de donis* (13 Edw. 1), by which tenants in tail were restrained from alienating their estates for a longer period than their own lives, were, after various devices had been attempted, at length evaded by means of fines and feigned recoveries; two modes of assurance that at length became so inseparably connected with entailed estates, as to form one of their inherent properties ; so that a condition or proviso restraining a tenant in tail from levying a fine or suffering a recovery was considered repugnant to the nature of his estate, and consequently void. (*Taltarum's case*, 12 Edw. 4, 14 *b*, pl. 16 ; Co. Litt. 223 (*b*), 224 (*a*) ; *Sonday's case*, 9 Rep. 128; *Foy* v. *Hinde*, referred to in Fearne Cont. Rem. 257, n. *f* ; *Poole's case*, Moor. 810, cited Cro. Jac. 69 ; *Taylor and Shaw*, Cart. 6, 22 ; *Collins* v. *Plummer*, 1 P.

Wms. 104 ; *Corbet's case*, 1 Rep. 83 ; *Mildmay's case*, 6 ib. 40 ; *Mary Portington's case*, 10 Rep. 36 ; *Pierce* v. *Win*, 1 Ventr. 321 ; *Taylor and Atkyns* v. *Horde*, 1 Bur. 84 ; *Mainwaring* v. *Baxter*, 5 Ves. 458 ; *Goodtitle* v. *Duke of Chandos*, 2 Bur. 1072.) The rule, therefore, which prevented the alienation of entailed estates being thus broken in upon, fines and recoveries became the common modes of assurance for conveying that species of property. (2 Lev. 29 ; Plow. 514 ; Bac. Law Tr. 149 ; Com. Dig. Estates (B. 27) ; 2 Cruise Essay, 189 ; Prest. Shep. Touch. 39 ; 2 B. Bac. Con. 117, 357 ; 1 Bur. 115 ; 1 Wils. Rep. pt. 1, p. 73 ; Shep. Touch. 40 ; *Tregonwell* v. *Strahan and Harrison*, 1 Wils. pt. 1, p. 73 ; as to fines, see 2 Blac. Com. 348 ; *Hunt* v. *Bourne*, 1 Salk. 339 ; Co. Litt. 50 ; 3 Atk. 141 ; Shep. Touch. 3, 6 ; Plow. 358 ; *Goodright* v. *Forrester*, 1 Taunt. 578 ; *Helps* v. *Hereford*, 2 B. & Ald. 242.) The great objection to them was, that they introduced a very roundabout and expensive course of proceeding to attain a very plain and simple object ; inconveniences which have been happily in a great measure removed by the statute 3 & 4 Will. 4, c. 74, by which fines and recoveries are altogether abolished, and a more simple and less expensive mode of assurance substituted in their stead.

Necessity of keeping in mind the effect formerly produced by fines and recoveries.

In discussing the operation of the statute just alluded to, it will be necessary always to keep in mind the effect produced by fines and recoveries upon entailed estates under the old system, in order to discover how and to what extent the law has been altered by the substituted mode of assurance.

Operation of fines and recoveries upon entailed estates.

The effect of a fine with proclamations levied by a tenant in tail would have been to bar his own estate tail, and to pass a base fee determinable on failure of issue of his body inheritable

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under such entail (Shep. Touch. 27 ; 33 Dyer, 48 ; Cro. Car. 156 ; Co. Litt. 372 ; Bac. Abr. Fines (E.) ; Com. Dig. Estate (B. 22, B. 25) ; but by suffering a recovery he could have barred, not only his own estate tail, but also all reversions and remainders expectant thereon, and thus have acquired an absolute estate in fee-simple. (Shep. Touch. 40, 41 ; Fearne C. R. 428, 8th edit.; *Benson* v. *Hodson*, 1 Mod. 111; 2 Lev. 28; Saund. Uses, 193.) And recoveries in equity of an equitable estate, and recoveries at law of a legal estate, had the same operation in barring estates tail. (Fearne C. R. 59, n. *d*, 61, n.) Yet, in order that a tenant in tail might have suffered an effectual recovery, he himself must either have been the actual tenant in tail in possession, or else he might have procured the concurrence of the person technically termed the tenant to the *præcipe*, who was seised of the preceding estate of freehold, upon which his estate tail was expectant. (Prest. Shep. Touch. 42, 44 ; Doct. & Stud. 49 ; Plowd. 514 ; 1 Prest. Con. 104 ; Pig. 36.)

Tenant in tail where there is a protector disabled from barring entail without protector's consent.

So under the act of Parliament we are now about to discuss, no tenant in tail, where there is a protector of the settlement, can bar the remainders expectant upon the determination of his estate, without the concurrence or consent of such protector ; but a tenant in tail may, by an assurance under that act, bar his own estate in the lands, and thus create a base fee ; producing, in fact, the same effect that a fine with proclamations would have done under the old system. (*M'William's case*, Hob. 333 ; *Grant's case*, 10 Rep. 50, *a* ; *Archer's case*, 5 Rep. 90, *a*.)

Protector—what.

The protector is a creature of the act under discussion, being a character unknown prior to the Fine and Recovery Substitution Act, by which he is constituted ; but his office assimilates very much to that of the tenant to the *præcipe* under the pre-existing law, operating in like

manner as a kind of check upon the too free alienation of settled property. There is, in some respects, however, a wide difference as to their qualifications. The tenant to the *præcipe* must have been seised of the immediate estate of freehold (whether by right or by wrong was immaterial) upon which the estate tail was expectant; his very existence being dependent upon his estate in the land. (Lit. s. 519; Prest. Shep. Touch. 42; Plow. 514; Pig. Rec. 28; Doct. & Stud. 49; *Athan* v. *Anglesea*, Gilb. Eq. Ca. 16.) But the protector is a kind of mixed character, sometimes deriving his origin from the estate which he himself takes in the property (sects. 22, 23, 24, 28, 30, 33), at others, from a mere appointment by the settlor, without his taking any estate or interest whatever (sect. 33); and that even to the exclusion of persons who, but for such appointment, would, from taking a preceding estate in the premises, have filled the character of protector under the act. So much, indeed, are the protector's duties of a personal nature, that his office does not determine, although he should alienate the very estate which constituted him the protector. (Sects. 22, 33.) And where the protectorship arises by means of a preceding estate, it is not necessary that, like the tenant to the *præcipe* under the old system, he should be seised of an estate of freehold; for by the provisions of this act an estate for years, determinable upon a life or lives, will make him a protector (sect. 22); but an absolute term of years, however long in point of duration, will not have that effect. Neither will the estate which a party takes as tenant in dower (sect. 27), heir (*ib.*), executor, administrator, or assign (*ib.*), constitute him or her a protector. Neither will a lessee, at a rent created or confirmed by a settlement (sect. 26), nor a bare trustee (sect. 27), (unless where under a settlement made prior to

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the passing of the act he would have been made the tenant to the *præcipe*), as such, become qualified for the protectorship. But where there shall be more than one estate prior to the estate tail, the owner of which, who but for the last two preceding clauses would have been the protector of the settlement, shall, by virtue of such clauses or either of them, be excluded, then the person (if any) who, if such estate did not exist, would have been the protector, will be such. (Sect. 28.)

Where the disposition of an estate took place before the 31st of December, 1833, the person to make the writ of entry in a recovery shall be the protector.

Provided that where a person having, on or before the 31st of December, 1833, disposed of a remainder or reversion in fee, who without this clause would have been the protector, and thereby have been enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then the person who but for this act would have been the proper tenant to the *præcipe*, shall be the protector. (Sect. 29.) This last provision, however, only relates to dispositions made prior to the year 1834.

Where a married woman alone shall be the protector, and where she and her husband together shall be the protector.

Where the prior estate of a married woman (sufficient to constitute a protector) is not settled to her separate use, she and her husband together will be the protector ; but if settled to her separate use, she alone will be the protector ; and in the latter case she may consent to an alienation without her husband's concurrence, in the same way as if she were sole (sect. 24) ; but if she is tenant in tail, she cannot convey without his consent ; and even with such concurrence, the conveyance must be duly acknowledged by her.

Court of Common Pleas in case of the husband being lunatic, &c. may dispense with his concurrence.

But if the husband be of unsound mind, whether found so by inquisition or not, or he is from any other cause incapable of executing the deed, or his residence be unknown, or he be in prison, or living apart from his wife, either by mutual consent, or sentence of

divorce, or transported beyond the seas, or any cause whatever, the Court of Common Pleas, by an order in a summary way upon the application of the wife, upon such evidence as to the court shall seem meet, will dispense with the concurrence of the husband in any case in which his concurrence is required by this act. (Sect. 91.) And where a husband is living apart from his wife, although his residence be known, and an application has been made to join in the conveyance, which he has refused to do, an order to the above effect may nevertheless be obtained, provided the husband takes no interest in the property. (*Re Fanny Maria Browne*, C. P. 14 Jan. 1846, 6 Law T. 297.)

Where husband is living apart from his wife, and he refuses to concur, an order to the above effect may be obtained.

In case the protector should become a lunatic, the Lord Chancellor, or the person for the time entrusted by the crown with the custody of the persons and estates of lunatics, will be the protector. (Sect. 33.) And where the protector is a convicted felon; or where he, not being the owner of the prior estate, is an infant, or not to be found; or where by the settlement the owner of the prior estate is not the protector, and there is no appointment of one; or where generally there is no protector, where there is a sufficient prior estate to constitute one, the Court of Chancery will be the protector. (*Ib.*)

Except where the Lord Chancellor, or other person entrusted with lunatics, or the Court of Chancery shall be the protector of a settlement in lieu of the husband.

Where the protector is insane or convicted of felony.

The settlor entailing lands is empowered by the settlement to appoint any number of persons, not exceeding three, and not being aliens, to be protectors; and he is also empowered by a power of appointment in the settlement to perpetuate the protectorship to any persons not exceeding three, not being aliens, whom he may think proper (sect. 32); but the same section also provides that every deed appointing a protector under a power in a settlement, and every deed by which a protector shall relinquish

Protector, how to be appointed.

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his office, shall be void, unless enrolled in Chancery within six months after the execution thereof.

Power of protector of giving or withholding consent.

The protector has the absolute power of giving or withholding his consent; and any shift or contrivance by which it shall be attempted to control this power, and any agreement to prevent him from exercising his absolute discretion, or entered into by him to withhold his consent, will be void (sect. 36); nor shall he be deemed a trustee with respect to his power to consent (*ib.*); neither shall a court of equity interfere to restrain him in the exercise of it (*ib.*); nor treat his giving consent a breach of trust (*ib.*); and the rule as to dealings between donees and objects of powers will not apply to dealings between protectors and tenants in tail. (Sect. 37.) A protector who is the owner of a prior particular estate—as an estate for life, for instance—does not, as we have just before remarked, by conveying away his estate, thereby cease to be the protector, but may at any time during his life consent to a disposition under the statute, notwithstanding the estate by which he was originally constituted protector has become vested in another person. And as on the one hand the protectorship does not cease by the protector's conveying away the property that originally made him such; so, on the other, he may consent to the disposition by the tenant in tail, and still retain his own estate, or he may, if he think proper, convey as well as consent; and if he does the latter, whatever estate he has in the lands may be included in the conveyance; but if he merely consent, the effect of such consent will be to bar all the ulterior limitations to take effect after or in defeasance of the estate tail, but his own estate in the premises will remain untouched.

Every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, is empowered, after the 31st day of December, 1833, to dispose of the entailed lands, either in fee or for any lesser estate, as against all persons whose estates are to take effect after or in defeasance of any such estate tail, saving always the rights of all persons *in respect of estates prior to the estate tail*, and the right of all other persons except those against whom such disposition is by this act authorized to be made: (Sect. 15.) The act, therefore, afterwards enacting (sect. 34), that where there is a protector his consent shall be requisite to enable an actual tenant in tail to create a larger estate than a base fee, a disposition made without such consent will only confer an estate of that kind, similar, as I have before remarked, to that formerly effected by a fine without proclamations. But if there is no protector, or the tenant in tail procures the consent of the former, then the assurance acquires all the force and operation which a recovery duly suffered would formerly have done; and will not only bar the estate tail of the tenant in tail, but also all estates, rights, titles, interests, and powers, to take effect after the determination or in defeasance of the same. As the statute prescribes a deed as the only instrument by which estates can be disentailed, a contract, though under seal, will be insufficient to bind any one beyond the tenant in tail himself, who, as I have before stated (*ante*, p. 150), if he enters into a contract for the sale of the entailed property, will be bound to perform it specifically. A will is altogether inoperative. But, notwithstanding that an estate cannot be disentailed except by deed, it is not necessary that such deed should be an indenture; any assurance, unless it be a will, by which a person can convey the legal estate in fee-simple absolute, provided it be enrolled as prescribed by the act, will suffice. It must, how-

Tenant in tail's power of disposition.

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ever, be a formal instrument, complete in all its parts; a court of equity having no power to relieve in case of defective or informal assurances; and every assurance by a tenant in tail (except a lease not exceeding twenty-one years at rack-rent, or not less than five-sixths of a rack-rent) will be inoperative unless enrolled in Chancery within six calendar months after the execution; but when so enrolled it will take effect from the time it was executed: (sect. 41.) Yet, for all this, a purchaser should lose no time in getting his deed enrolled, as a subsequent *bonâ fide* purchaser for valuable consideration would be entitled to priority in case he should get his deed enrolled before the first purchaser. No proof of the execution of the deed is required at the time of enrolment, consequently the certificate of enrolment is no proof of execution: (*Bishop* v. *De Burgh*, before Vice-Chancellor Knight Bruce, 22nd December, 1845; 6 L. T. 295.)

Where protector's consent is given by a distinct deed.

The consent of the protector may be given either in the disentailing assurance or by a distinct deed to be executed either on or at any time before the day on which the assurance shall be made. If given on a subsequent day, the consent will be inoperative: (sect. 42.) But where such consent is given by a distinct deed, it will be considered as absolute and unqualified, unless such deed shall refer to the disentailing assurance, and shall confine the protector's consent to disposition thereby made: (sect. 43.) And when the protector has once given his consent he cannot afterwards revoke it: (sect. 44.)

Assurances under this act will pass both legal and equitable estates, and not mere rights.

An assurance under this act will pass estates both legal and equitable, vested or contingent, and also mere equities and rights; so that, where the issue in tail would have been barred by a fine, with proclamations, under the old system, the person who, unless so barred, would have been the tenant in tail, may still, by a conveyance

under such act, produce the same effect as he could formerly have done by being vouched in a common recovery: (sect. 19.) And although a conveyance without the protector's consent will only pass a base fee, still, where such base fee and the remainder or reversion in fee in the same lands unite in the same person, and there shall be no intermediate estate between the base fee and such remainder or reversion, then the base fee will be enlarged into as large an estate as the tenant in tail could have created with the consent of the protector. And it seems that, under a preceding statute (3 & 4 Will. 4, c. 27, s. 23), where an assurance which, for want of the protector's consent, can only convey a base fee, the title will, nevertheless, become enlarged into a fee-simple, absolute at the end of twenty years; and thus, after the expiration of that period, become effectually exonerated and discharged from all estates in remainder or reversion: (sect. 39.)

Voidable estates, how confirmed.

A voidable estate created by a tenant in tail in favour of a purchaser for valuable consideration, will be confirmed by a subsequent disposition of such tenant in tail by any assurance under this act (other than a lease not requiring enrolment), by the tenant in tail alone where there is no protector, or with the protector's consent where there is; and should the latter refuse to consent, the voidable estate may still be confirmed to the extent the tenant in tail could have disposed of the same without such consent: (sect. 38.) But a voidable estate cannot be confirmed as against a subsequent purchaser for valuable consideration, and without notice: (*Ib.*)

Analogy between a fine and recovery and an assurance under the statute.

I have shortly before remarked that a tenant in tail might, by a fine, have barred the entail, so as to have concluded himself and his issue, whether he were actually seised in tail or not; nor was this extinguishing power confined merely

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to the tenant in tail himself, but extended also to the issue, the latter of whom might, by levying a fine in their ancestor's lifetime, have bound the estate as far as they and their issue were concerned, or, in other words, the issue inheritable under the entail could, by levying a fine with proclamations, have barred their expectancies; but this they are now expressly prohibited from doing by the act now under consideration, which expressly directs that "nothing therein contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein" (sect. 20); and the assurance by which he could formerly have effected this (viz., a fine), the act itself has swept away. Even under the old law, if the heir in tail who levied the fine had died, and there had been a failure of issue of his descendants because the entail descended on him or his issue, the fine would not have barred any of the collateral issue (1 Prest. Abs. 403), and although the entail was extinguished by the fine levied under these circumstances, the lands, in case no alienation had taken place, might still have descended to the issue, not as heirs inheritable under the entail, but as heirs general, the estate descending as a determinable fee, and so entitling the common heir to take to the exclusion of the special heir (*Baker* v. *Willis*, Cro. Car. 476); yet such special heir, though no estate remained in him, still retained the bare personal privilege of being vouched in a common recovery, the effect of which may, as I have already remarked, be accomplished by an assurance under this act. This has introduced the modern practice by which a tenant in tail, where he sells his estate and is unable to procure the consent of the protector, enters into a covenant to perfect the title at a future period, when, by there ceasing to be a protector to the settlement, he will have full

power by a disposition in pursuance of the act to enlarge such base fee into a fee-simple absolute: (sect. 38.) Precedents of forms both of the covenant for perfecting the title at a future period, as also of the deed of further assurance in pursuance of such covenant, will be supplied in the Appendix.

Practical observations.

It must always be kept in mind that the act now under discussion only enables the tenant in tail to dispose of the entailed lands, as against persons claiming under the entail, and those whose estates are to take effect after it, and does not affect prior estates. (Sect. 15.) For example, if lands were limited to A. for life, remainder to B. for life, remainder to C. in tail, with divers remainders over, and C. were, during the life of A. and B., with the consent of the protector, to make a disposition in pursuance of this act, its effect would be to bar C.'s estate tail, and the remainders expectant thereon; but the preceding estates for life of A. and B. would remain as they were before. Nor can any assurance under the act convey a larger interest than is commensurate with the estate out of which it is derived. In this respect, therefore, the law remains as it was previously: for where an estate tail was limited out of a lesser estate than a fee-simple absolute, the tenant in tail could not, even by suffering a common recovery, have extended his estate beyond the duration of the estate out of which it was carved. If, therefore, it had been derived out of a base fee, or a fee subject to a condition, or out of an estate tail, never effectually barred, so as to enlarge the original estate into a fee-simple, a recovery suffered by the owner of such derivative estate tail could not, in right of such derivative estate tail, have had any other effect than to bar the remainder or reversion in fee of the person by whom the estate tail was created, and of all persons claiming under him. (*Ib.*) But a tenant

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in tail might, by suffering a recovery, have defeated a condition subsequent annexed to his estate, a breach of which would have determined his estate; as, for example, a condition to reside for a certain period of the year on the entailed property, or to assume the name and arms of the person creating the settlement. The like observations are also applicable to conditions for avoiding the estate on the nonpayment by the tenant in tail of a particular sum of money, as 100*l.* to A. B.; or where the enjoyment of the estate is restricted to some uncertain period, as so long as a particular tree should stand: (1 Mod. Rep. 111; *Page* v. *Hayward*, 2 Salk. 570; Pig. Com. Rec. 176; Fearne C. R. 423, 7th edit.; *Gulliver and Corrie* v. *Shuckburgh Ashby*, 4 Burr. 1929; *Driver and Edgar* v. *Edgar*, Cow. 379.) And it seems that the same end may now be attained by an assurance under this act.

What tenants in tail are restricted from barring the entail.

There are certain persons, however, who, notwithstanding they may fill the characters of tenants in tail, are, nevertheless, restricted by this act from disposing of their estates, as indeed they were under the pre-existing law. These are, 1st, tenants in tail after possibility of issue extinct (sect. 18); 2nd, tenants in tail where the reversion is in the Crown (*ib.*); and 3rd, women tenants in tail, *ex provisione viri*, under the statute 11 Hen. 7, who are expressly disabled from making any disposition under this act, except with such consent as was previously necessary under the said statute 11 Hen. 7, to have rendered a fine or recovery levied or suffered by her valid and effectual: (sect. 16.) But except as to any settlement made previously to the passing of this act (3 & 4 Will. 4, c. 74), the statute 11 Hen. 7 is repealed: (sect. 17.)

Restrictions upon recoveries, how removed.

The restrictions by which a tenant in tail was disabled from docking the entail, so as to defeat the remainder, except in Term time, during

which alone a recovery could have been suffered, are wholly removed, and thus the remainder-man's very small remaining chance is altogether taken away from him; so that whether a disentailing deed be made in Term time or in vacation is now wholly immaterial.

Other modes of assurance by tenants in tail.

Another mode of assurance by which a tenant in tail might formerly have barred his issue was a warranty; as, for instance, by a lineal warranty with assets, or a collateral warranty without assets, provided he had an actual estate tail in possession; but by the 14th section of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) all warranties of land, which after 31st Dec. 1833, shall be made or entered by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of such estates tail.

Defects in fines and recoveries, how cured.

The Fine and Recovery Substitution Act also cures defects in fines and recoveries: (sect. 5, 6, 7, 8.) This must, however, form a subject for our future consideration. The operation of the act upon dispositions of copyhold tenants in tail, and upon the estates tail of bankrupts, will be discussed under the respective heads of copyholders and of bankrupts. The operation of the act upon the landed property of married women, except so far as relates to the protectorship, has been already treated on under the head of Married Women.

Discontinuance.

Another mode by which a tenant in tail might formerly have disentailed his estate was by discontinuance. This he might have done by conveying away the entailed property by a tortious mode of conveyance—as a feoffment, for instance—by means whereof the estate tail became discontinued, and the estate of the heir in tail and those in remainder or reversion turned into mere rights, which they could not have restored by

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entry, but were driven to their action by writ of *formedon secundum formam doni.* A mere innocent mode of conveyance, as a lease and release, or a bargain and sale enrolled, would not have produced this effect; and such heir in tail or remainder-man might, at the time their estates would otherwise have fallen into possession, have entered on the lands or brought their action of ejectment for the recovery of them. And now, by the stat. 3 & 4 Will. 4, c. 27, which, after abolishing writs of *formedon*, amongst the other real actions swept away by that act, expressly enacts that no discontinuance shall for the future defeat any right of entry or action for the recovery of land; so that the heir in tail and remainder-man, notwithstanding the tenant in tail should convey by such a tortious mode of conveyance as would formerly have worked a discontinuance, may still enter or bring their action of ejectment, as in those cases where such tenant in tail had attempted to convey by an innocent mode of assurance; and since the recent statute 8 & 9 Vict. c. 106, no feoffment made after the 1st day of October, 1845, shall have any tortious operation for any purpose whatever.

### 6. *Tenants for Life.*

Tenant for life, unless restrained by condition, may alienate his lands.

A tenant for life, unless restrained by condition, may alienate his lands to the extent of that estate; or he may create any lesser interest out of it (Cru. Dig. tit. 3, ch. 1, pl. 32); but then it must not exceed, in point of duration, the extent of his own interest in the premises, as a long term of years, for instance: though even this will still be effectual as long as his estate endures. But he cannot create a larger estate; and any attempt to do so by a tortious mode of assurance, as a feoffment or the like, was formerly holden to

be a forfeiture of his estate: (Gilb. Ten. 38; Wright Ten. 203; 1 Inst. 251.) But if he had adopted an innocent mode of conveyance, as a lease and release, for instance (Cru. Dig. tit. 3, c. 1, pl. 36; Fearne C. R. 473; Willes Rep. 383; 2 Blac. Com. 275), or bargain and sale enrolled (Cru. Dig. tit. 32, c. 10, pl. 32, 33; *Seymour's case*, 10 Rep. 95), which have not the effect of devesting estates in remainder or reversion, it would not have effected a forfeiture; nor will even a feoffment have that operation now; for the recent statute (8 & 9 Vict. c. 106, s. 6), enacts that a feoffment made after the 1st day of October, 1845, shall not have any tortious operation, consequently the cause of forfeiture altogether ceases as far as concerns future feoffments; but as the act is only prospective, feoffments made previously will still retain their tortious property.

How far a tenant for life may be restricted from alienating his lands.

A tenant for life may be restrained by express condition from alienating his estate in the lands either during the whole or any part of his term: although a distinction seems formerly to have been taken between a lease made to a man and his assigns, and where the word *assign* was omitted; so that in the former case he could not be restrained from alienating his estate, though in the latter he might; but that distinction has been long exploded, and the doctrine above laid down fully established: (Hob. 170; 1 Inst. 204, *a*, 223, *b*.) But a tenant in tail cannot, as I have already shown, be restrained by any condition from barring his estate tail; neither can a protector of a settlement, though he may chance also to be a tenant for life under the settlement, be restrained from giving or withholding his consent to dispositions made in pursuance of the Fine and Recovery Substitution Act.

Tenant by the curtesy.

A tenant by the curtesy is a tenant for his own life; and, consequently, the rules above laid down

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with respect to assurances by ordinary tenants for life, are also applicable to him: (Cru. Dig. tit. 57, ch. 5; 2 Inst. 309.) In one respect, however, it seems that a tenant by the curtesy has a more extensive power of disposition than an ordinary tenant for life. The former takes by operation of law, and not by way of conveyance; consequently his estate is not burdened with any such restrictions against alienation as we have just before seen that of the tenant for life may be subjected to.

### 7. *Tenants pur autre Vie.*

Tenants *pur autre vie* may alienate their estates.

Tenants *pur autre vie*, unless restricted by some express condition, may alienate their estates and pass an interest commensurate with the lives of the *cestuis que vie*, or for any lesser interest, so that it does not exceed that duration. Tenants *pur autre vie* are also liable to forfeit their estates in like manner as tenants for life, by attempting to dispose of them by a tortious mode of conveyance; but as all tortious modes of conveyance seem now to be done away with (3 & 4 Will. 4, c. 74, s. 2; 8 & 9 Vict. c. 106, s. 6), it appears as a necessary consequence that no mode of conveyance, made by a tenant for life or tenant *pur autre vie*, can, for the time to come, or, more correctly speaking, subsequently to the 1st of October, 1845, operate as a forfeiture of his estate. The grantee of a tenant for life becomes, as a matter of course, tenant *pur autre vie;* but if he reconvey the estate to his grantor, the latter will again become tenant for life, the estate *pur autre vie* being the lesser, merging in the estate for life, which is the greater estate; as it also will where lands are limited to one person for the life of another, with remainder to himself for his own life: the latter, in the eye of the law, being considered as the greater estate.

Tenants in dower were subject to the same restrictions respecting alienation as other tenants for life. But where a doweress aliened by feoffment and the feoffee died seised, whereby the entry of the person in reversion was taken away, he could have had no writ of entry *ad communem legem*, until after the decease of the tenant in dower; and then the warranty, which was at that time usually inserted in all deeds, barred the reversioner if he was heir to the doweress. To remedy this evil, it was provided by the statute of Gloucester (6 Edw. 1, c. 7), that upon the alienation in fee, or for life of a tenant in dower, she should forfeit her estate, and that the heir should have a writ, *in casu proviso*, in her lifetime. By the statute 11 Hen. 7, c. 20, also, and 32 Hen. 8, c. 36, no feoffment, fine, recovery, or warranty by a tenant in dower will take away the right of entry in the heir or reversioner, but shall be a forfeiture of her estate; so that even previously to the act of 3 & 4 Will. 4, c. 27, s. 39, the heir might have entered upon the lands, or brought his action of ejectment for the recovery of them; but it would have been no forfeiture of her estate, unless she had conveyed by some tortious mode of conveyance, which it seems she is now disabled from doing, as no assurance will now be permitted to operate tortiously: (3 & 4 Will. 4, c. 74, s. 2; 8 & 9 Vict. c. 106, s. 4.)

Tenants in dower.

### 8. *Tenants for Years.*

A tenant for years, unless prohibited by the express terms of his lease, may assign over his term or grant an underlease (Cru. Dig. tit. 8, ch. 2, pl. 45); but this power of alienation may be restricted by the lease (Hob. 107; 1 Inst. 204, *a*, 2236); which restriction will be equally binding upon the representatives as upon the lessee himself: (*Moore's case*, Cro. Eliz. 26; *Berry* v. *Taunton*, *ib.* 331; *Pennant's case*, 3 Rep. 64;

Tenants for years, unless prohibited by express terms of lease, may assign or grant under leases.

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*Roe dem. Gregson* v. *Harrison*, 2 T. R. 425.) Yet, although a voluntary assignment by a lessee or his representatives, where there is a restriction against assignment, will be a forfeiture of the lease, it will be otherwise where the assignment is made by operation of law, as where the lease is taken in execution and sold in pursuance of it (*Doe dem. Mitchinson* v. *Carter*, 8 T. R. 57); unless it be fraudulently and collusively done by the lessee, in order by such means to evade the condition. As, for example, if the lessee were to give a warrant of attorney to confess a judgment to a creditor, for the express purpose of enabling such creditor to take the lease in execution under the judgment, which would be construed as such an act of fraud upon the lessor, that the latter would be enabled to recover the premises from a purchaser under the sheriff's sale: (*Doe* v. *Carter*, 8 T. R. 300.) In the case of a lessee who is, by the terms of his lease, prohibited from assigning, becoming bankrupt, the prohibition will be discharged, and his assignees may sell and assign his interest, without incurring a forfeiture (6 Geo. 4, c. 16, s. 75; *Doe dem. Cheere* v. *Smith*, 1 Marsh. 359; 5 Taunt. 795; 2 Rose, 280; *Doe dem. Mitchinson* v. *Carter*, 8 T. R. 300; *Lloyd* v. *Crispe*, 5 Taunt. 249; *Holland* v. *Worsley*, 1 Campb. N. P. C. 20); unless such interest is, and as it undoubtedly may be, made determinable on the lessee's becoming a bankrupt, and the lessor enabled, on the occurrence of that event, to enter upon the demised premises, as if for a forfeiture: (*Roe* v. *Galliers*, 2 T. R. 133; *Brandon* v. *Robinson*, 18 Ves. 429.)

Conditions in restraint of assignment not favoured.

Conditions to restrain a lessee from assigning are not favoured; therefore, a condition of this kind will not preclude the lessee from underletting the property: (*Crusoe and Blencowe* v. *Bugby*, 3 Wils. Rep. 234; 2 W. Blackst. 766.) And

conditions of this kind affect the original lessor and his personal representatives only, and do not extend to his assignees; consequently, if the lessee assigns the term with his lessor's assent and licence, such assignee may assign the term to any other person, without any further assent on the part of the lessor: (*Dumpor's case*, 4 Rep. 119, *b.*) So a demise to A., B., and C. with a like condition, if the licence to alien be granted to A. only, and A. aliens accordingly, the condition will thereby be determined with respect to B. and C. also: (*Leeds* v. *Crompton*, cited 4 Rep. 120, *a.*; 1 Roll. Abr. 472, G. pl. 7; *Taylor* v. *Shum*, 1 B. & P. 21; Steph. N. P. 1124; Selw. N. P. 480, 9th edit.) And where the condition is that the lessee shall not alien any part of the land without the lessor's consent, and the lessor afterwards consents to his alienating a part, the condition will thereby become discharged as to the residue: (4 Rep. 120, *a.*) There is, however, one species of assignment by licence of a lessor which will not discharge the condition, and which we must be careful not to lose sight of; which is, where there is an exception out of the usual restriction to alienate, in favour of an assignment by will, and the lessor assigns by will accordingly, and after the lessee's death his executors make another assignment, and not by will, in which case, it seems, the last assignment will be invalid: (*Lloyd* v. *Crisp*, 5 Taunt. 249.) And although a condition not to assign without licence will not affect an underlease, yet a lessee may be restricted as well from underletting as from assigning, if a proviso to that effect be inserted in the lease. And a court of equity will not relieve against a forfeiture occasioned by a breach of covenant against assigning or underletting without the consent of the lessor: (*Davies* v. *Moreton*, 2 Cha. Cas. 127; 2 Cru. Dig. tit. 13, ch. 1, s. 52; 1 Mad. Pract.

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40, 2nd edit.; Selw. N. P. 481, 9th edit.; *Hill* v. *Barclay*, 18 Ves. 63; *Loval* (*Lord*) v. *Ranalagh* (*Lord*), 3 Ves. & Bea. 31; *Rob* v. *Harrison*, 7 T. R. 245; *Doe dem. Holland* v. *Worsley*, 1 Campb. N. P. C. 20.) There is, however, a distinction between those cases where the lease contains a condition for avoiding the lease in cases of alienation, and where the lessee merely enters into a covenant against so doing; for it is only in the former case that the lease will be forfeited by the alienation. In the latter the lessor's only remedy is by an action for damages for the breach of covenant: (*Paul* v. *Morse*, 8 B. & C. 488; see also *Whichcot* v. *Fox*, Cro. Jac. 398; *Fox* v. *Swann*, Styles, 483; 2 Cru. Dig. tit. 13, ch. 1, pl. 40, 41.) But if a lessee for years attempts, by a *tortious* mode of conveyance, to create a larger estate than by law he is entitled to do, and thereby devests the estates in remainder or reversion, it will operate as a forfeiture of his own estate in the premises: (Dy. 362, 366; 1 Inst. 251; Cro. Eliz. 332.) But where a lease may be avoided for breach of a condition, if the lessor accept rent due afterwards, or distrain for the same, after notice of the cause of forfeiture, it will restore the validity of the lease: (Cru. Dig. tit. 13, ch. 1, pl. 52; Selw. N. P. 481, 9th edit.; *Goodright dem. Walter* v. *Davids*, Cow. 804; *Whichcot* v. *Fox*, Cro. Jac. 398.) But it would be otherwise if the lessor, at the time he received the rent, or distrained for the same, was ignorant of any cause of forfeiture having been incurred: (*Roe dem. Gregson* v. *Harrison*, 2 T. R. 425.)

### 9. *Copyholders and Tenants of Customary Estates.*

Copyholder may alienate his estate.

A copyholder, although he formerly held his tenements merely at the will of the lord, has now

established his right so firmly, that as long as he continues to render the services and observes the customs of the manor, he can neither be turned out of his possessions (Wat. Cop. 52, 93; *Williams* v. *Lonsdale*, 3 Ves. 572), nor precluded from transferring his estate and interest in the copyhold premises. But notwithstanding this extensive power of alienation, a copyholder, in the absence of an express custom, cannot, without the licence and authority of the lord, make a lease for more than a single year (4 Rep. 26, *a.*; Bulstr. 190; *Jackman* v. *Hoddeston*, Cro. Eliz. 35; *East* v. *Harding*, *ib.* 498; Moore, 393; *Mathews* v. *Wheaton*, 6 Vin. Abr. 119), even by parol (*East* v. *Harding*, *suprà;* Wat. Cop. 327); nor even for one year, if it be to commence *in futuro* (*ib.*); and should he presume so to do, he will thereby incur a forfeiture of his estate; as he will, even where he has a licence, if he exceeds it and grants a longer term than by the terms of such licence he is empowered to do: (*Jackson* v. *Neale*, Cro. Eliz. 395.) Where, however, there is a custom in the manor for copyholder to grant leases, a term granted in pursuance of the custom would be good, and of course no forfeiture: (Vin. Abr. 118; Cru. Dig. tit. 10, ch. 5, pl. 8.) And if a lease be made with the lord's licence, no matter how long the term, it will be effectual; nor can any forfeiture accrue thereby (6 Vin. Abr. 217); and the lessee in such case may assign his term, or make an underlease, without any new licence being requisite for that purpose; the interest of the lord during the continuance of such term having been already discharged by the licence: (*Turner* v. *Hodges*, Hutt, 102.) In order, also, that a copyholder's lease may operate as a forfeiture, a common law interest must pass; consequently, a mere covenant or an agreement for a lease will not have that effect: (Gilb. 233; *Richards* v.

Cannot grant leases without licence from the lord.

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*Ceely*, 3 Keb. 638; Wat. Cop. 328; *Hamlen* v. *Hamlen*, 1 Bulstr. 190; *Doe* v. *Clare*, 2 T. R. 739; *Doe* v. *Morris*, 2 Taunt. 52; *Doe* v. *Lufkin*, 4 East, 221; *Denn* v. *Cartwright*, *ib.* 29.) Upon the same principle, therefore, a feoffment without livery, or a bargain and sale without enrolment, whereby the copyholder professes to convey a freehold interest, will not effect a forfeiture of his estate (*East* v. *Harding*, Cro. Eliz. 498; Co. Litt. 59, *a*, N. (3); Wat. Cop. 327; Godb. 369; Gilb. 255); because, from the imperfection of those assurances, they were incapable of passing a common law interest; yet, in order to work a forfeiture, it is not requisite that the conveyance should be made by what in conveyances of freehold property is considered a tortious mode of assurance, for if it be made by such an instrument as is capable of passing any common law interest in freehold property, it will be sufficient (Lit. s. 34; Cru. Dig. tit. X., ch. 5, pl. 5); the ground of which is, that a copyholder being but a tenant at will, such an act of alienation would be treated as a determination of his will. But a bargain and sale, although enrolled, will not produce this consequence; because a bargain and sale only passes an use till the statute operating upon such use transfers the possession: and as a copyholder is incapable of being seised to an use, the statute cannot attach; the consequence of which is, that, no estate passing, there can be no forfeiture: (Wat. Cop. 328.) And it also seems that a surrender by a copyholder for life, to the use of another in fee, will be no forfeiture: (*Oldcott* v. *Levell*, Moore, 753; Wat. Cop. 328; *Bullock* v. *Diblay*, 4 Rep. *a.*); as a surrender is incapable of passing more than the party making it can lawfully transfer; and even if such a surrender could pass the fee, it would be no more than the fee of the copyhold interest, and not an estate at common law; which, as I have before

remarked, is essential to work a forfeiture; besides, where a surrender is made, it must be done with the privity of the lord, or, which is the same thing, of his steward; and if the lord accept the surrender in fee from the copyholder for life, and admit the appointee accordingly, it will be nothing more nor less than his own act: (Wat. Cop. 329.)

Relief in equity.

Relief is sometimes afforded by a court of equity where a copyholder has inadvertently incurred a forfeiture (1 Mad. Prac. 44, 2nd edit.); but this has rarely, if ever, been done when the act occasioning the forfeiture was a wilful and voluntary one; consequently, whenever it has been incurred by the copyholder's having conveyed a common law estate (*Sir H. Peachy* v. *Duke of Somerset*, 1 Str. 447; Pre. Cha. 574), or a lease without licence, relief has been always refused: (*ib. id.*; see also 1 Mad. Prac. 44.)

Copyholders, tenants in tail.

With respect to copyholders who are tenants in tail, the most usual mode by which they barred the entail was by suffering a recovery in the lord's court; but in some manors there was a custom to bar them by a mere surrender, whilst in others it was optional to adopt either a recovery or a surrender for that purpose; either mode of assurance producing precisely the same result. The late statute of the 1 Will. 4, c. 65, which re-enacts the statute 47 Geo. 3, c. 8, s. 2, and extends to lands in ancient demesne, as well as to copyholds, empowered all persons not being under coverture, and every *feme covert* also (provided she was solely examined by the lord or steward of the manor), to appoint an attorney for the purpose of surrendering the lands, in order to constitute a tenant to the plaint, for suffering a recovery in the lord's court. These acts have been since repealed by the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), by which last-mentioned act the

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barring of estates tail in copyholds must for the future be governed; which, in the case of legal estates, must be effected by surrender; and, where the estate is merely equitable, either by surrender or by deed: (sect. 50.) And where the consent of a protector is necessary, the deed by which he consents must be produced to the lord or his steward at or before the surrender, which the lord or steward must indorse, and enter the deed and indorsement on the rolls; and the indorsement is to be evidence of the production; and the lord or steward is to indorse upon the deed a memorandum of such entry: (sect. 52.) In case the protector does not consent by deed, his consent must then be given to the person taking the surrender; and if the surrender be out of court, the consent should be stated in the memorandum of the surrender, and the memorandum signed by the protector; which, when entered on the rolls, will be evidence both of the consent and surrender; but if the surrender be in court, the surrender must be entered on the rolls, with a statement of the consent; which entry, or a copy, is to be available as evidence, as any other entry on the court rolls, or a copy thereof: (sect. 52.) An equitable tenant in tail may dispose of his copyhold estate, by a deed, to be entered on the rolls; and, if the protector consent, by a separate deed, the latter must be executed either previously to or simultaneously with the disposition, and entered on the rolls by the lord or his steward, who must indorse on the deeds a memorandum of them; and unless the deed be so entered it will be void as against a subsequent purchaser for valuable consideration: (sect. 53.) But neither disposition will require enrolment, otherwise than by entry on the court rolls.

### 10. *Bankrupts and their Assignees.*

As to dispositions by bankrupts.

As the law formerly stood, under the statute 13 Eliz. c. 7, a trader, from the moment of his committing an act of bankruptcy, was deprived of all power of disposing of his property, so that all alienations or dispositions made by him after that time were absolutely null and void (Henley's Bankrupt Law, 258, 3rd edit.); and this whether the purchaser was or was not cognizant of the act of bankruptcy. By a subsequent enactment, however, (21 Jac. 1, c. 15, s. 1), no purchaser for a valuable consideration was to be impeached unless a commission issued within five years after the act of bankruptcy. By a still more recent enactment (46 Geo. 3, c. 135), all *bonâ fide* conveyances and transactions with any bankrupt, more than two years before the date of his commission, were rendered valid, notwithstanding any prior act of bankruptcy, unless the party purchasing had notice of it. And by the still more recent act, 6 Geo. 4, c. 16, s. 81, all conveyances by, and all contracts with, any bankrupt, *bonâ fide* made and entered into more than two calendar months before the issuing of the commission, are rendered valid, notwithstanding any prior act of bankruptcy, if the person dealing with the bankrupt had not at the time of such dealing notice of any prior act of bankruptcy. And even if the purchaser had such notice, provided he were a *bonâ fide* one, and for a valuable consideration, the sale will not be impeached by reason thereof, unless a commission or fiat shall be sued out against the bankrupt within twelve months after the act of bankruptcy, instead of the five years, as the law stood previously: (sect. 86). And under the recent act, 2 Vict. c. 4, s. 12, all *bonâ fide* conveyances by a bankrupt, previous to issuing a fiat against him, are rendered valid, notwith-

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standing a prior act of bankruptcy, unless the purchaser has notice of it. Nor will a purchaser be affected by such notice, unless a fiat be sued out within twelve calendar months after the act of bankruptcy; and all contracts entered into with any bankrupt before the issuing of the fiat are rendered valid, unless in the case of a fraudulent preference.

Property of bankrupt—how vested in his assignees.

As the law formerly stood, the estate of the bankrupt did not become vested in his assignees until it had been duly assigned to them by the commissioners (stat. 20 Jac. 1, c. 19), in which assignment the provisional assignee or assignees (if any had been chosen) must have joined; and until such assignment was made, the property was not transferred out of the bankrupt (*Ex parte Proudfoot*, 1 Atk. 253; *Jacobson* v. *Williams*, 1 P. Wms. 385, 386); but now, under the late act, 1 & 2 Will. 4, c. 56, ss. 25, 26, all the real estate of the bankrupt vests in his assignees by virtue of their appointment, without any deed of conveyance whatever. And it is the duty of the assignees to sell the property at the earliest convenient opportunity; nor ought they to delay the sale upon the probability of the property fetching a higher price at some future period (*Ex parte Goring*, 1 Ves. 168; see also 6 *ib.*, 622; Henley's Bankrupt Law, 215, 3rd edit.; *Ex parte Montgomery*, 1 G. & J. 338); and the court will reluctantly interfere to stay a sale upon an application from the assignee for that purpose; and the provisional assignee is now expressly prohibited from all control over this subject.

Power of assignees to sell bankrupt's estate.

The assignees may sell by private contract; but for all this they should be cautious of so doing without the consent of the creditors; for if it were to be shown, upon a complaint made by the latter, that more money might have been made of the property by a public sale, it would

be a circumstance of evidence against the assignees not to be disregarded: (*Ex parte Dunman*, 2 Rose, 66; *Macshane* v. *Gibb*, 1 C. & P. 149; Henley's Bankrupt Law, 216, 3rd edit.) And where the property is sold by public auction, no assignee should buy in any of the lots without the knowledge and approbation of the creditors; as in that case, should any loss be incurred upon a resale of any of the lots so bought in, he will be charged with the loss on the lot undersold, notwithstanding there may be a gain upon the resale of the other lots sufficient to make a balance in favour of the bankrupt's estate: (*Ex parte Lewis*, 1 G. & J. 69; *Ex parte Buxton*, *ib.* 355.)

Assignees bound to produce a good title.

In *Pope* v. *Simpson* (5 Ves. 145), Lord Rosslyn expressed an opinion (which seems wholly uncalled for by the circumstances of the case) that where parties purchased of assignees, they had no right to expect more than that the assignees should deliver over such a title as the bankrupt had; but this dictum, which is at utter variance with former decisions upon the subject (*Orlebar* v. *Fletcher*, 1 P. Wms. 737; *Spurrier* v. *Hancock*, 4 Ves. 667; Henl. Bkt. Law, 218, 3rd edit.; 1 Mad. Prac. 438, 2nd edit.), has not since been adhered to. Its correctness was indeed repeatedly denied by Lord Eldon (see *White* v. *Foljambe*, 11 Ves. 337; *M'Donald* v. *Hansom*, 12 Ves. 277; see also 18 Ves. 512), who said expressly that he never knew the principle adopted by Lord Rosslyn in *Pope* v. *Simpson*. "Previously to that decision," observed his lordship, "I always said, and I say now, that if assignees of a bankrupt agree to sell, they agree to sell with a good title" (11 Ves. 343); and it has since been finally determined that assignees of bankrupts stand in precisely the same situation as other vendors of real property (*McDonald* v. *Hansom*, *supra*); consequently

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they may, like ordinary vendors, enter into stipulations with respect to the title and the evidence to be adduced in support of it (*Frome* v. *Wright*, 4 Mad. 364); and this it is their bounden duty to do, should the circumstances of the title require it. They must also, where the property is sold in lots, and in fact in all cases where the title-deeds are not to be delivered over to all the purchasers, take especial care to provide against furnishing attested copies, or other copies of deeds or documents that cannot be handed over to the purchaser; for, unless protected by a stipulation of this kind, assignees must, like all other vendors, where the title-deeds cannot be delivered, give attested copies of them at the expense of the estate: (*Ex parte Stuart*, 2 Rose, 215; Henl. Bkt. Law, 218, 3rd edit.; see also *ante*, p. 6.)

Effect of Fine and Recovery Substitution Act upon estates tail of bankrupts.

Before the passing of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), where a bankrupt was tenant in tail, the mode by which the entail was barred was by the usual deed of bargain and sale of the commissioners, which had the same effect as any rightful assurance by the tenant in tail himself: (1 Com. Dig. 98, pl. 34, 35.) Hence, if he were tenant in tail in possession, the bargain and sale would have produced the same effect as a common recovery, and have barred, not only the estate tail, but also all remainders expectant thereon: (1 Prest. Abs. 173, 174.) But where the bankrupt had only an estate tail in remainder, expectant on an estate of freehold in some other person, the commissioners could only have conveyed a base fee, producing the like effect that a fine with proclamation by the bankrupt himself would have done; because, not having an estate of freehold, he was unable to suffer a recovery: (*Pye* v. *Danbuz*, 3 Bro. C. C. 595; *Jervis* v. *Tayleur*, 3 Barn. & Ald. 557; see also 1 Com. Dig. 98, pl. 35;

Henl. Bkt. Law, 228, 3rd edit.) Upon this doctrine a doubt arose whether, at a future period (when, but for the bankruptcy, the bankrupt would have been seised in tail in possession, and thus qualified to suffer a recovery), the commissioners could, by a subsequent bargain and sale, produce the effect of a recovery, and enlarge the previous base fee into an absolute estate in fee-simple: a point so exceedingly doubtful, that it became the usual practice to require a common recovery, either from the bankrupt himself, or from his issue in case of his death (1 Prest. Abs. 174); but now, under the 56th sect. of the Fine and Recovery Substitution Act, a disposition by the commissioners will have the same effect as a recovery by the bankrupt and his issue under the same circumstances; that statute empowering the commissioners to dispose of the estate just in the same manner as the bankrupt himself could have done; and also, by a subsequent disposition, to enlarge the base fee into a fee-simple absolute, in all cases where the bankrupt himself or his issue could have done so; the statute placing the commissioner, as to any power of alienation, in precisely the same situation as the bankrupt himself would have oocupied. In like manner, also, is his power of disposition restricted; consequently, if there be a protector to the settlement, as the latter gives or withholds his consent, to that extent is the commissioner enabled to bar the entail: (sect. 38, and see *ante*.) And where, for want of such consent, the commissioner is only enabled to pass a base fee, and there should afterwards, during the continuance of the base fee, cease to be a protector, the base fee will become enlarged into a fee-simple absolute: (sects. 60, 61.)

Power of commissioners of bankrupts to

The commissioner is also empowered, accordingly as the protector gives or withholds his consent, to confirm a voidable estate in favour of

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confirm voidable estates.

a purchaser (sect. 62); and where there ceases to be a protector during the continuance of a base fee, where that only passes, it will become enlarged into a fee-simple absolute; but it is by the same clause also provided, "that if the disposition made by such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him."

Acts of bankrupt—how void as against subsequent disposition by commissioners.

All acts and deeds done and executed by the bankrupt tenant in tail are rendered void against any disposition by the commissioner under this act (sect. 63): but, subject to the powers given to the commissioner and to the estate in the assignees, the bankrupt shall have the same powers of disposition under this act as he would have had if he had not become bankrupt: (*Ib. id.*)

Effect of disposition by commissioners.

The disposition of the commissioner shall, if the bankrupt be dead, have, in the cases therein mentioned, the same operation as if he were alive; that is to say, in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall, at the time of the

disposition, be any issue who, if the base fee had not been created, would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition: (sect. 65.)

Disposition of commissioners, except of copyholds, must be enrolled in Chancery.

The disposition of the commissioner, except in the case of copyholds, will be void, unless enrolled in Chancery within six months after execution ; and all dispositions of lands held by copy of court roll must be entered on the court rolls of the manor ; and if there shall be a protector who shall consent to the disposition of such copyholds, he shall give his consent by a distinct deed, which consent shall be void unless the deed of consent be executed by the protector, either on or at any time before the day on which the deed of disposition shall be executed by the commissioner ; and such deed of consent shall be entered on the court rolls ; and it is imperative on the lord or steward to enter every deed required by this act to be so entered on the court rolls of the manor, and to endorse on every deed so entered a memorandum signed by him, testifying the entry of the same on the court rolls : (sect. 59.)

### 11. *Corporations.*

Corporations restricted from alienation.

All ecclesiastical and eleemosynary corporations were restrained by certain statutes, passed in the reign of Queen Elizabeth (stats. 1 Eliz. c. 19 ; 13 Eliz. c. 10 ; 14 Eliz. cc. 11 and 14 ; 18 Eliz. c. 11 ; and 43 Eliz. c. 49), from every mode of alienation except that of leasing ; and they were placed under very considerable restrictions even in the exercise of this power. Incumbents of livings were, however, enabled, under the statutes 17 Geo. 3, c. 53, and 21

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Geo. 3, c. 66, to raise money, by way of mortgage, for repairing or building houses; and by statute 55 Geo. 3, c. 147, incumbents of benefices are enabled to exchange parsonage houses and glebe lands, with the consent of patron and ordinary, for other houses and lands, and also to purchase lands to be annexed to such benefices as glebe land thereof, and by mortgage of their tithes, rents, and other profits, to raise money for such purchases. But previously to the late Municipal Reform Act (3 & 4 Will. 4, c. 69), there were no restrictions imposed upon lay corporations (10 Rep. 30, *b*; Sid. 162; *Colchester* (*Mayor of*), v. *Lowton*, 1 Ves. & Bea. 226, 244), who might have alienated their lands, except for election purposes, as freely as any other class of persons; but by the 94th section of the act above alluded to, they are now restrained from selling or mortgaging any real estates, or leasing them for a longer term than thirty-one years, and at reasonable rent, except in pursuance of some agreement entered into on or before the 5th of June 1835; but when the council are desirous of selling, they should represent the case to the Lords of the Treasury, with the approbation of three of whom they may sell on such terms as such lords may approve of. But the council are nevertheless still empowered to grant building leases for terms not exceeding seventy years, provided the lessee contract to erect buildings thereon of the yearly value of the land: (sect. 90.) If, however, such corporate body be seised as such, and not as charitable trustees, of any lands to which an advowson or right of presentation to a benefice is appurtenant, or of an advowson in gross, &c. such advowson or presentation is directed to be sold under the direction of the Ecclesiastical Commissioners; the produce vested in the public funds, and the yearly interest

carried to the account of the borough fund: (sect. 139.)

As to corporation leases.

With respect to leases granted by ecclesiastical and eleemosynary corporations, it seems that, by the common law, they were, in many cases, only binding on the parties by whom they were made, and not upon their successors: (4 Com. Dig. tit. xxxii. ch. v. pl. 32.) And the statute 32 Hen. 8, c. 28, made all such leases for term of years, or life, good and effectual against the lessors and their successors; yet, by subsequent enactments (1 Eliz. c. 19; 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; 1 Jac. c. 3), all ecclesiastical or eleemosynary corporations were restrained from alienating the lands for more than the term of twenty-one years, or three lives; upon which leases the accustomed rent, or more, must be yearly reserved thereupon: (2 Blac. Com. 321.) But notwithstanding that the duration of the leases must not exceed three lives, or twenty-one years, they may nevertheless be granted for a more limited period: (1 Inst. 44, *b*; 4 Com. Dig. tit. xxxii. ch. v. pl. 40.) Houses in corporation or market towns may, however, under the statute 14 Eliz. c. 11, s. 17, in some instances be let for forty years; provided they be not the mansion-houses of the lessors, and have not more than ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair; and they may also be alienated in fee-simple for lands of equal value in recompense. But when there is an old lease in being, no concurrent one shall be made unless the old one shall expire within three years: (2 Blac. Com. 321.) And no lease, by the equity of the statute, shall be made without impeachment of waste; and all bonds and covenants tending to frustrate the provisions of the 13th and 18th of Eliz. are void: (Co. Litt.

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45 ; 2 Blac. Com. 321 ; 4 Com. Dig. tit. xxxii. ch. v. pl. 53.)

Practical observations on the restrictive statutes.

"Concerning these restrictive statutes," Sir W. Blackstone remarks (2 Bl. Com. 321), "there are two observations to be made. First, they do not by any construction enable any persons to make any such leases as they were by the common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years, or three lives, even with the consent of the patron and ordinary, yet he is not able to make any lease at all, so as to bind his successor, without such consent. Secondly, that though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a sole corporation ; and they are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest ; for the act was intended for the benefit of the successor only, and no man shall take advantage of his own wrong." The learned commentator then proceeds to remark that "there is yet another restriction with regard to college leases by statute 18 Eliz. c. 6, which directs that one-third of the whole rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s* ; or that the lessees should pay for the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges on the market day before the rent becomes due."

Stat. 6 & 7 Will. 4, c. 20.

The act 6 & 7 Will. 4, c. 20, has made some important enactments as to the renewal of ecclesiastical leases, by which it is provided that from the 1st of March, 1836, no ecclesiastical person shall grant any new lease of any land or tithes,

parcel of his ecclesiastical possessions, by way of renewal of any lease granted for more than two lives, until one of the persons for whose life such lease was made shall die, and then only for the surviving lives or life and such new life or lives as with the life or lives of the survivor or survivors shall make up the number of lives, not exceeding three, for which such lease shall have been made; and where any lease shall have been granted for forty years, no ecclesiastical person shall grant any new lease by way of renewal until fourteen years of such lease shall have expired; or where for thirty years, until ten years shall have expired; or where for twenty-one years, until seven years shall have expired; and when any such lease shall have been granted for years, it shall not be renewed for life or lives: (sects. 1, 9.) It is also provided that, wherever any ecclesiastical person shall grant any renewed lease, it shall contain a recital, if a lease for lives, of the names of the *cestuis que vie*, stating which are dead, &c.; and if a lease for years, for what term of years the last preceding lease was granted; and every recital is to be deemed evidence of the truth of the matter recited; and a penalty is imposed on persons introducing recitals into such leases, knowing them to be false. But by a subsequent enactment, passed in the same session, it was enacted that leases granted under the provisions of the former act are not void on account of their not containing such recitals as are in that act mentioned. The same act then proceeds to state, that where a practice has existed for ten years past to renew such leases for forty, thirty, or twenty-one years, at shorter periods than fourteen, ten, or seven years, the lease may be renewed conformably to such practice; provided that such practice shall be proved to the satisfaction of the bishop: (sect. 4.) This act is not to prevent ecclesiastical persons

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from exchanging any life or lives in their lease, with the approbation of the king (now queen), archbishop, or bishop, as the case may be (sect. 5); neither does it prevent grants under acts of Parliament (sect. 6); nor leases for the same term as the preceding leases (sect. 7); nor will it render illegal leases valid (sect. 8); neither does it extend to Ireland: (sect. 9.)

### 12. *Traitors and Felons.*

Traitors and felons incapable of holding lands.

By attainder for treason or other felony, the convict becomes incapable of holding any description of landed property whatever (Perk. s. 26; Prest. Shep. Touch. 232); but if he previously conveys it away, such conveyance will be good as against all persons but the crown; for notwithstanding that it has been said (see Prest. Shep. Touch. 232) that such conveyance is not good as against the lord of whom the land is held, the latter doctrine is wholly unfounded in principle; hence Mr. Preston, with his usual learning and accuracy, remarks (Prest. Shep. Touch. 232; 3 Prest. Abs. 392), "The title of the lord is a title by escheat, and there can be no escheat in this case, since there is an actual tenant by the alienation. If," he adds, "an attainted person be disqualified to alien as against the lord, this disability is because he is *civiliter mortuus;* for treason there is a forfeiture of the inheritance; in felony there is not any such forfeiture." (See also Vin. Abr. Attainder (B), Forfeiture (P); Bac. Abr. Forfeiture (A); Com. Dig. Forfeiture (B).) To remedy also the extreme law respecting forfeitures (which, corrupting the hereditary blood of the offender, rendered his general heirs incapable of inheriting or transmitting their own property by heirship in all cases where they were obliged to derive their title through the attainted person, whether through himself only, or a more remote ancestor),

an act of Parliament was passed by which corruption of blood was confined to the crimes of treason, petit treason, and murder: (54 Geo. 3, c. 145.) And by a subsequent statute (3 & 4 Will. 4, c. 106, s. 10), it is enacted, that when any person from whom the descent of any land is to be traced shall have any relation who having been attainted shall die before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such lands shall have escheated in consequence of such attainder before the 1st of January, 1834.

Whether tenant in tail can derive his pedigree through an attainted ancestor.

Previously, indeed, to either of the last above-mentioned statutes, an heir in tail might have derived his pedigree through an attainted person; for, notwithstanding a tenant in tail forfeits all lands of which he is seised in tail at the time of the crime committed, or at any time afterwards, yet he does not forfeit that which he never had, viz. the right of succession by the next heir in tail, unless the attainted person be or become owner in point of estate or of right: (3 Prest. Abs. 393; Bro. Des. pl. 1; Bro. Forfeiture, pl. 37; *Lord Lumley's case*, 3 Co. 10; *Mantell* v. *Mantell*, Cro. Eliz. 28; *Sheffield* v. *Ratcliff*, Godb. 305, Hob. 347.)

Practical observations.

Upon the whole, therefore, it seems that an actual conveyance after the commission, but before conviction of the crime, will intercept the title of the lord; but in case attainder should follow, such conveyance would be inoperative against the crown (Co. Litt. 42; Prest. Shep. Touch. 232, n. 131; 3 Prest. Abs. 392; Vin. Abr. Attainder (B), Forfeiture (P); Com. Dig. Forfeiture (B); Bac. Abr. Forfeiture (A).) The lord's title by escheat would, however, overreach a devise by will, because a devise does not take effect until the death of the testator, whereas

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a deed takes effect immediately upon its execution.

### 13. *Aliens.*

Aliens incapable of holding lands.

Aliens are incapable of holding lands in this country, which upon office found become forfeited to the crown; and it seems that the title of the crown will prevail over that of a *bonâ fide* purchaser, to whom the alien may, previously to such office found, have sold and conveyed the property: (2 Blac. Com. 274; Vin. Abr. Alien (A); Com. Dig. Alien (C); Shep. Touch. 232; Co. Litt. 2, 8, 42.) But the conveyance of an alien will be good against all other persons except the crown; and it has also been holden that an alien tenant in tail may suffer a recovery which will be effectual as against him and his issue, and the persons in remainder or reversion; because, until office found, the alien is seised of the freehold, and if the tenant to the *præcipe* has the freehold at the time when the recovery is suffered, it will be sufficient, though it be defeated afterwards: (4 Leon. 84; Prest. Shep. Touch. 232; Golds. 82; 1 Prest. Convey. 257; 5 Com. Dig. xxxvi. ch. 2, pl. 11, 12.) But a settlor under the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), cannot appoint an alien to be a protector of a settlement of entailed property: (sect. 32.) (*a*)

### 14. *Mortgagees.*

Mortgagee disabled from selling before foreclosure, unless under a trust or power of sale.

A mortgagee, unless under a power or trust for sale, cannot, before the equity of redemption is barred, either by lapse of time or foreclosure, sell the mortgaged lands so as to defeat the mort-

(*a*) It may be proper here to remark that Jews, simply as such, are not to be regarded as aliens; for unless they are actually aliens either by birth or by allegiance, they are entitled to hold lands in the same manner as any other of Her Majesty's subjects. They may even hold advowsons and present to benefices!

gagor's equity of redemption; neither does a fine levied, or a recovery suffered, by a mortgagee in possession, bar either the mortgagor or persons claiming under him (*Weldon* v. *Dux Ebor*, 1 Vern. 132; Patch on Mortgages, 118); unless in the latter instance the mortgagor were to come in upon the voucher: (Cro. Jac. 593; *Stanhope* v. *Tucker*, Pre. Cha. 435.) Nor will a lease made by a mortgagee in possession be binding upon the equity of redemption, unless there was an absolute necessity for it (2 Com. Dig. tit. xv. ch. 2, pl. 19; *Hungerford* v. *Clay*, 9 Mod. 1); and then only at improved rack-rent: (*Weldon* v. *Rallison*, 1 Cha. Cas. 172.) But where the mortgage deed contains a power or trust enabling the mortgagee to sell the mortgaged premises, he may undoubtedly do so (*Corder* v. *Morgan*, 18 Ves. 344; *Clay* v. *Sharpe and others*, *ib.* 346, n.); and where the usual provisions are inserted that the mortgagee's receipts shall be a sufficient discharge to purchasers, the mortgagee may confer a good title without the mortgagor's concurring in the sale. Whether on failure of heirs of the mortgagor the equity of redemption will become absolute in the mortgagee, or escheat to the lord, seems to have been a disputed question; but the better opinion seems to be, that neither would be entitled in case the mortgagor should leave any personal representatives; because, as the mortgagor may demand payment of the money from the personal representatives, the court would order a reconveyance to them, and would, if necessary, consider the estate reconveyed as coming in lieu of the personalty, and as assets to answer even simple-contract creditors: (*Burgess* v. *Wheate*, 1 Blacks. 123; 1 Eden, 177.)

Lease made by mortgagee not binding upon equity of redemption.

Mortgagee may sell under a trust or power of sale.

Whether on failure of heirs of mortgagor, equity of redemption will become absolute in mortgagee.

Where a mortgagee has been in the uninterrupted possession of the mortgaged lands for twenty years and upwards, he may convey away

Sale by mortgagee in possession when valid

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without power of trust or sale.

his estate so as to bind the equity of redemption. Mortgages, it is true, were not within the old Statute of Limitations (21 Jac. 1, c. 16); but courts of equity long since determined that, by analogy to that statute, twenty years should be the time to bar the mortgagor of his equity of redemption (*Jenner* v. *Tracey*, and *Belch* v. *Harvey*, 3 P. Wms. 287, n.; *White* v. *Ewer*, 2 Ventr. 340; *Anon.* 3 Atk. 313; 2 Fonbl. Eq. 264, 265; 1 Eq. Ca. Abr. 313, n. *a*; *Pearson* v. *Pullen*, 1 Cha. Cas. 102; *Cloberry* v. *Symonds*, 1 Vern. 397; *Sanders* v. *Hord*, 1 Cha. Rep. 79; *Clapham* v. *Bowyer*, *ib.* 110; *Frazer* v. *Moore*, Bunb. 54; *Corbet* v. *Barker*, 1 Anstr. 138; *Hovenden* v. *Annesley* (*Lord*), 2 Scho. & Lef. 636; *Hodle* v. *Healey*, 1 Ves. & Bea. 539; 1 Mad. Pract. 519, 2nd edit.; 1 Redes. Tr. 174, n. *u.*); which rule of equity has been confirmed by the recent Statute of Limitations, 3 & 4 Will. 4, c. 27, by the 28th section of which it is enacted, that the mortgagor shall be barred at the end of twenty years from the time when the mortgagee took possession, and from the last written acknowledgment of the mortgagor's title. But this will not operate as a bar to parties under the disabilities of coverture, infancy, lunacy, or absence beyond the seas, who are allowed ten years after the removal of their disabilities to assert their rights: (sect. 16.) But when the time once begins to run, it will continue to run on unimpeded by any succeeding disabilities (sect. 18; see also *Corval* v. *Sykes*, 1 Cha. Rep. 1931; *Floyd* v. *Mansell*, Gilb. Eq. Rep. 185; *Knowles* v. *Spence*, 1 Eq. Ca. Abr. 315; *St. John* v. *Turner*, 2 Vern. 418); nor will any claim be allowed after forty years: (sect. 17.) Imprisonment, which was formerly ranked as a disability, is omitted in the recent Statute of Limitations; and, therefore, simply as such, can no longer be treated as a disability. And neither Scotland, Ireland,

nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, or any of the adjacent islands (forming part of Her Majesty's dominions), are to be deemed beyond the seas. And where a party has absconded beyond the seas to avoid or retard justice, he will not in such case be allowed to avail himself of this disability: (*Jenner* v. *Tracey*, and *Belch* v. *Harvey*, 3 P. Wms. 287, n. (B); Patch on Mortgages, 284; 2 Mad. Pract. 519, 2nd edit.)

### 15. *Trustees.*

Trustees are necessary parties to a conveyance.

Whenever the legal estate is vested in trustees, they are necessary parties to the conveyance of the property, and without this concurrence it is impossible to confer a good title on a purchaser. On this account difficulties sometimes arise in consequence of a sole trustee, or the only remaining trustee out of several, dying, leaving an infant or a lunatic heir, or his heir cannot be found, or the trustee has left no heir, or it is not known who the heir really is.

Statutory enactments to enable infant heirs of trustees and mortgagees to convey.

To obviate these inconveniences several enactments have from time to time been passed, by which infant trustees or mortgagees are empowered to convey by the direction of the Court of Chancery; and where trustees or mortgagees of lands are lunatics, the Lord Chancellor may direct the committee of such persons to convey: (6 Geo. 4, c. 74; 11 Geo. 4 & 1 Will. 4, c. 60, ss. 3—6.) And when trustees of freehold or leasehold estates are out of the jurisdiction, or are not amenable to any process of the Court of Chancery, or it shall be uncertain whether the trustee last known to be seised as aforesaid shall be living or dead, or if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall refuse to convey such land for the space of twenty-eight days next after a proper

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deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same, then, and in every such case, it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose in the place of such trustee or heir, to convey to such persons, and in such manner as the said court shall think proper, and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had made and executed the same.

Court of Chancery empowered to direct surrenders of copyholds.

Under this act, the Court of Chancery is empowered to direct the surrender of copyholds by a person appointed by the court, and the lord will be bound to accept the same (*Reg.* v. *Pitt*, 3 Jur. 10, 28); but the above-mentioned act does not apply in the case of its being unknown whether or not the trustee has left an heir. This omission was, however, supplied by the subsequent enactment, which has provided for there being *no heir* of a trustee or mortgagee, but, which is rather singular, has left wholly unprovided for the case of the heir of a *mortgagee* not being known: (*Ex parte Stanley*, 5 Sim. 320; *Re Goddard*, 1 Myl. & Kee. 25; *Ex parte Payne*, 6 Sim. 645; *Re Dearden*, 3 Myl. & Kee. 508; *Pendergast* v. *Eyre*, Cas. temp. Sug. 131.) Then the statute 1 & 2 Vict. c. 69, after reciting that doubts had arisen upon the construction of the statutes above referred to, enacts "that where any person seised of any lands by way of mortgage shall have departed this life without having been in possession of such land, or in receipt of the rents and profits thereof; and the money due in respect of such mortgage shall have been, or shall be paid to his executor or administrator, and the devisee, or heir, or other real representative, or any of the devisees or heirs or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable

to a process of the Court of Chancery, or it shall be uncertain, where there were several devisees or representatives, who were joint-tenants, which of them was the survivor, or it shall be uncertain whether any such devisee or heir or representative being living or dead, or if not known to be dead, *it shall not be known who was his heir*, or where such mortgagee or any such devisee or heir or representative shall have died without an heir; or if any such devisee or heir shall neglect or refuse to convey such land, for the space of twenty-eight days after a proper deed for making such conveyance shall have been tendered for his execution, or by an agent duly authorized by any person entitled to require the same, *then*, and in every such case, it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose, in the place of the devisee's heir or representative (whether such devisee, heir or representative shall or shall not have a beneficial interest in the money paid to the executor or administrator as aforesaid), to convey such land in such like manner as, by the said first-recited act, the said court is empowered to appoint a trustee to convey in the cases therein mentioned, in the place of a trustee, or the heir of a trustee; and every such conveyance shall be as effectual as if such devisee or heir or representative had executed the same."

It was not intended by the last-mentioned act to repeal either of the two former acts, and therefore those acts are to be construed as they were before; the subsequent enactment being intended to apply to those cases only which it expressly provided for. In a case, therefore, in which it was uncertain whether the person who was the mortgagee had left an heir, Lord Langdale, M. R., thought that, though it was not within the 11 Geo. 4, c. 1, yet that it came within the

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provisions of 11 Geo. 4 & 1 Will. 4, c. 60, and his lordship made the order accordingly (*Re Wilson's estate, and Re Gathorne*, 8 Sim. 392); but in a subsequent case Lord Langdale held that the case of a mortgagee himself, being out of the jurisdiction, was neither within the 11 Geo. 4 & 1 Will. 4, c. 60, nor the 1 & 2 Vict. c. 69: (*Green* v. *Holden*, 1 Beav. 207.)

Direction by Lord Chancellor, how to be made.

The direction by the Lord Chancellor or the Court of Chancery under the authority of the above-mentioned act (sect. 11) is to be made upon petition, and where, on account of length of time which shall have elapsed since the creation or last declaration of a trust, the title of a person claiming a conveyance or transfer may appear to require deliberate investigation in the presence of all parties interested, in order to prevent the vesting of the legal estate in a person who may not really be entitled to the benefit thereof, or if it should otherwise appear not proper to make an order upon petition, the Lord Chancellor or Court of Chancery is empowered, if he thinks fit (although this does not deprive the court of the power to make the usual order in a summary way) (*Re Clifford's estate*, 2 Myl. & Kee. 624; *Ex parte Dover*, 5 Sim. 500), to direct a bill to be filed to establish the right of the party seeking the conveyance or transfer, and, upon the establishment, by a decree of such right, by the same decree, or an order in the cause, or in lunacy, or both, to direct a conveyance or transfer. And where the court by a decree declares that an infant heir is a trustee and that the right of the party is established to the conveyance, no further petition will be necessary, and the court may go on to direct the conveyance under such decree: (*Broom* v. *Broom*, 3 Myl. & Kee. 443; *Walton* v. *Merry*, 6 Sim. 328; *Miller* v. *Knight*, 1 Kee. 129.)

Stat. 7 & 8 Vict. c. 76.

By a later act than those above alluded to, an executor or administrator of a mortgagee entiletd

to the mortgage money was authorized upon redemption to convey the legal estate in the land where possession had not been taken by virtue of the mortgage and no action or suit was pending: (7 & 8 Vict. c. 76, s. 9.) But this provision has been repealed by the subsequent statute 8 & 9 Vict. c. 106, s. 1, and has not been restored by any subsequent enactment.

No act of a trustee allowed to prejudice his *cestui que trust.*

It is a rule of equity that no act of a trustee shall prejudice his *cestui que trust* (*Lechmere* v. *Carlisle* (*Earl of*), 3 P. Wms. 211, 215); but it contains one exception, viz. where the trustee is in the actual possession of the trust estate and conveys it to a purchaser or mortgagee, who has no notice of the trust, for a valuable consideration; in which case such purchaser or mortgagee, as the case may be, will be entitled to hold the estate against the *cestui que trust* (*Finch* v. *Earl of Winchelsea*, 1 P. Wms. 279; *Burgess* v. *Wheate*, 1 Ed. 195; *Nullard's case*, 2 Freem. 43; *Mansell* v. *Mansell*, 2 P. Wms. 681; *Willoughby* v. *Willoughby*, 1 T. R. 171; *Dunbar* v. *Tredennick*, 2 Bal. & B. 318; *Parkes* v. *White*, 11 Ves. 209), for by such conveyance the purchaser acquires the legal estate, and having by the purchase acquired an equal equity with the *cestui que trust*, the legal estate will be suffered to prevail. But it would be otherwise if the purchaser had notice of the trust, for in that case he would become merely a trustee for the *cestui que trust*, whatever amount of consideration he may have paid for the purchase: (*Sanders* v. *Dehew*, 2 Vern. 271; *Langton* v. *Astrey*, 2 Cha. Rep. 30; *Mansell* v. *Mansell*, 3 Atk. 238; *Pearce* v. *Newbyn*, 3 Mad. 186; *Mackreth* v. *Symmons*, 15 Ves. 350; see also *Adair* v. *Shaw*, 1 Sch. & Lef. 262.) But a purchaser without notice from a purchaser with notice would not be bound by the trust, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor will be insufficient to

Purchaser without notice when entitled to hold against *cestui que trust.*

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invalidate it: (*Harrison* v. *Forth*, Pre. Cha. 51; *Pitts* v. *Edelph*, Toth. 164; *Ferrars* v. *Cherry*, 2 Vern. 384; *Brandling* v. *Ord*, 1 Atk. 571; *Martins* v. *Joliffe*, Amb. 313; *Sweet* v. *Southcote*, 2 Bro. C. C. 66; *Salisbury* v. *Bagot*, 2 Swanst. 608.) But this will not include the trustee himself, who, if he repurchases, will still take the property subject to the original trusts: (*Bovey* v. *Smith*, 1 Vern. 60; *Lowther* v. *Carlton*, 2 Atk. 242; Com. Dig. tit. xii. ch. 4, pl. 12.) Nor will a purchaser under a voluntary conveyance, even without notice, be entitled to hold the lands discharged of the trusts; for, notwithstanding his want of actual notice, a court of equity will presume it against him, where he paid no consideration: (*Mansell* v. *Mansell*, 2 P. Wms. 681; *Pye* v. *George*, 2 Salk. 680; *Spurgeon* v. *Collier*, 1 Ed. 55; *Sanders* v. *Dehew*, 2 Vern. 271; *Langton* v. *Astrey*, 2 Cha. Rep. 30.) Many instances cannot, however, occur where a trustee will have it in his power to defraud his *cestui que trust* by conveying away his estate, which can hardly ever happen, unless where the trustee acts as the actual owner, and has the title-deeds in his possession (1 Mad. Prac. 456, 2nd edit.); and even then it can be but rarely done, as the title-deeds themselves, if they showed any estate in the trustee, would at the same time, in all probability, disclose the trusts themselves, and the nature of the character under which he held the lands. It sometimes, however, happens that a person takes a conveyance in the name of a trustee, and there is no declaration of trust contained in the purchase-deed, or a trustee purchases lands in his own name, out of trust-moneys to which other parties are beneficially entitled; in either of which cases it seems that a conveyance by the trustee of the purchased lands to a subsequent *bonâ fide* purchaser, without notice, will defeat the claims of the *cestui que trust*. But, except in purchases

out of trust-moneys, it can seldom happen that a purchaser can be unaffected by notice; for even if a purchaser should take a purchase in the name of a trustee, he will generally exercise sufficient acts of ownership over the property to render some inquiry necessary on the part of a subsequent purchaser; and, generally speaking, whatever is sufficient to put a party upon inquiry, is good notice in equity. Yet a person purchasing of one who has made a voluntary settlement of his property will not be affected with notice: (*Smith* v. *Lowther*, 1 Atk. 489; *Taylor* v. *Baker*, Dan. 7; *Pye* v. *George*, 1 P. Wms. 128; *Buckle* v. *Mitchell*, 18 Ves. 110; *Pulvertoft* v. *Pulvertoft*, *ib.* 90; *Metcalf* v. *Pulvertoft*, *ib.* 183; see also *Gooch's case*, 5 Co. 60, *a*; *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Doe* v. *Manning*, 9 East, 59; *Doe* v. *Hopkins*, *ib.* 70; *Hill* v. *Bishop of Exeter*, 2 Taunt. 69; *Gully* v. *Bishop of Exeter*, 10 B. & C. 601; *Currie* v. *Hind*, 1 Myl. & Cra. 580; *Webb* v. *Lugar*, 2 You. & Col. 247.) Neither will a purchaser who takes a conveyance of the property with a knowledge that the vendor's wife has a claim to dower out of it be affected by such notice.

Statute of Limitations will not run as between trustee and *cestui que trust*.

A trustee who has been a long time in possession may attempt to set up a possessory title, withholding the title-deeds altogether; but however long he may thus have been in possession, it will not enable him to confer a marketable title; and in a very recent case (*Cooper* v. *Emery*, Phill. 388; *Hodgkinson* v. *Cooper*, 6 L. T. 451), it was held that a possession of upwards of sixty years, together with the general reputation of ownership, without showing any origin of the title, or producing any conveyance, would not confer a title; because the party in possession might have acquired it as a trustee. It must also be always kept in view that, under the recent Statute of Limitations (3 & 4 Will. 4, c. 27), the time does not begin to run in cases of express trust, until

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there has been a conveyance to a purchaser for valuable consideration: (sect. 25.) (*Young* v. *Waterpark* (*Lord*), Lord Chancellor's Court, 20th Dec. 1845, 6 L. T. 517.)

Where a trustee may convey against the consent of his *cestui que trust.*

But although, generally speaking, a trustee is disabled from conveying away an estate to the prejudice of his *cestui que trust*, yet there are certain special cases in which he may convey, not only without, but even against, the express directions of the *cestui que trust;* as where a trustee sells under a trust or power of sale contained in a mortgage-deed, and the mortgagor, who, as to the surplus proceeds is a *cestui que trust,* forbids the sale.

Where a greater proportion of property is sold than is necessary for the purposes of the trust.

It often happens that real estate is devised upon trust for sale and payment of debts, legacies, and other charges created by the will, upon which sales purchasers were formerly scrupulous, where more lands were sold than were sufficient for the purpose; but it has now long been settled that, though more be sold than was at all necessary, no *bonâ fide* purchaser will be prejudiced thereby. (*Spalding* v. *Shalmer*, 1 Vern. 301; *Lutwynch* v. *Winford*, 3 Bro. C. C. 248; 1 Com. Dig. tit. xii. ch. 4, pl. 28, 29.) In *Culpepper* v. *Aston* (2 Cha. Cas. 115), it was also held that a devise of real estate to executors, to be sold for payment of debts in case the personal estate should be deficient, would render it unnecessary for a purchaser to inquire whether there was or was not a deficiency of the personal estate; but however the law may be where lands are devised directly to the executors, as was the case in *Culpepper* v. *Aston*, the prevailing opinion seems to be, that where executors have a mere authority to sell for the purpose of raising as much money as the personal estate should prove deficient, in order to pay debts, legacies, &c., the power does not arise unless the personal estate actually does prove deficient: (see Mr. Butler's note to Co. Litt. 290; Co. Litt. 290,

b. 1, n. 1, s. 12; *Anon.* 1 Salk. 153; *Jebb* v. *Abbett*, 1 Bro. C. C. 186, n.; 2 Mad. Pract. 443; 4 Ves. 99.) A devise to trustees or executors upon trust to sell will pass the lands to the trustees, &c. (stat. 1 Vict. c. 26, ss. 30, 31); but where lands are simply devised to be sold by them, it will pass a mere authority, and no estate whatever in the lands themselves: (6 Edw. 6, c. 25, *a*; Litt. s. 169; Latch, 43; *Howell* v. *Barnes*, Cro. Car. 382; *sed vide Barrington* v. *Attorney-General*, Hardr. 416; and Co. Litt. 383, overruled by *Cholmondeley* v. *Clinton*, 19 Ves. 261; 2 Mer. 71; *ib.* 357.) It may also be laid down as a general rule, that where lands are vested in trustees to be sold, their receipts will be a sufficient discharge to purchasers (*Cuthbert* v. *Baker*, 1 Cru. tit. xii. ch. 4, pl. 32; *Balfour* v. *Welland*, 16 Ves. 151; *Sowarsby* v. *Lacy*, 4 Mad. Rep. 142; *Barker* v. *Devonshire* (*Duke of*), 3 Mer. 310), still there are exceptions to this rule, as in some cases of specific charges upon the land, or scheduled or particularized charges. As trustees have all equal power, interest and authority, they cannot act separately as executors, but must all join both in conveyance and receipts: (2 Fonbl. Eq. lib. 2, ch. 7, s. 5.)

Trustees having all an equal power cannot act separately.

### 16. *Cestui que Trust.*

Equitable estates are to be enjoyed, by the *cestuis que trust*, in the same condition as legal estates, and they are to be entitled to the same benefits of ownership as if the estates were actually executed in them (*Courthope* v. *Heyman*, Carth. 25; *Warmstrey* v. *Tanfield*, 1 Cha. Rep. 29; *Goring* v. *Bickerstaff*, 1 Cha. Cas. 8; *Cornbury* v. *Middleton*, *ib.* 211; *Burgess* v. *Wheate*, 1 Eden, 195); and the *cestuis que trust* may, without the intervention of the trustees, or the possibility of their preventing them from exer-

Equitable estates, power of disposition over.

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cising their ownership, act as if no trusteeship existed: (*Phillips* v. *Brydges*, 3 Ves. 127.) And the assignee of a *cestui que trust* may call upon the trustee to convey to him, and on his refusal so to do, may file a bill against him to compel a conveyance, and that even without making the assignor a party: (*Goodson* v. *Ellison*, 3 Russ. 583.)

### 17. *Persons who have already parted with their Estates.*

Under what circumstances persons who have parted with their estates may still retain a disposing power.

Under certain circumstances, parties who have parted with their estates, so that no interest whatever, either legal or equitable, remains vested in them, may yet retain a disposing power; as in the instance I have before alluded to, of a subsequent conveyance to a *bonâ fide* purchaser for valuable consideration, by a person who has previously made a voluntary settlement of the same identical property; in which case, the subsequent disposition will be effectual, and, as such, defeat the prior voluntary conveyance. Again, a tenant in tail who has levied a fine, though he has by that means parted with all his estate in the entailed lands, yet, both he and his issue will still, to a certain extent, retain a conveying power, which, previously to the late Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), might have been exercised, either by himself or his issue, being vouched in a common recovery for the purpose of barring the estates in remainder or reversion (*Beaumont's case*, 9 Rep. 138; *Baker* v. *Willis*, Cro. Car. 476), and the same object it is presumed may now be accomplished by an assurance under the Fine and Recovery Substitution Act above alluded to. The same observations are also applicable to a tenant in tail, who since the passing of the last-mentioned act has converted his estate tail into a base fee; in which case, though no

estate whatever remains in him, he must yet convey as if seised in fee. Nor does a tenant for life, who is the protector of a settlement, by conveying away his life estate cease to be the protector; consequently, he may give or withhold his consent to the alienation of the tenant in tail just as he could have done previously.

### 18. *Donees of Powers.*

Right of alienation in donees of powers will depend upon the particular terms of the instrument creating the power.

The right of parties to sell under powers must depend in every case upon the particular terms expressed in the instrument by which they are created. A general power of appointment without any restriction will confer an absolute power of disposition over the property it embraces, whether the donee does or does not take an actual estate in it. If he takes an estate, then the power will be appendant or appurtenant to such estate, but if no estate be limited to him, then the power will be collateral, or in gross. If no particular form be prescribed, then any mode of assurance capable of passing the property will be a valid execution of the power (*Daniel* v. *Upley*, Latch, 9, 39, 134; *Hasting's* (*Dame*) *case*, 3 Keb. 511; *Saunders* v. *Owen*, 2 Salk. 467; *Dighton* v. *Thomlinson*, 1 P. Wms. 149; *Dyer* v. *Awsiter*, *ib.* 165; *Wykham* v. *Wykham*, 11 East, 458); but if any particular form be prescribed, then the terms thereby imposed must be strictly complied with (*Hawkins* v. *Kemp*, 3 East, 410; see also *Digge's case*, 1 Rep. 173; *Bath and Montague's case*, 2 Freem. 193; 3 Cha. Cas. 55; *Birde* v. *Stride*, Bridg. 21; *Thayer* v. *Thayer*, Palmer, 112; *Blockville* v. *Ascot*, 2 Eq. Ca. Abr. side note, 659; *Kibbett* v. *Lee*, Hob. 312; *Dormer* v. *Thurland*, 2 P. Wms. 506; *Mansell* v. *Mansell*, Wilm. 36; *Darlington* (*Earl of*) v. *Pulteney*, Cow. 260; confirmed in *Doe* v. *Lady Cavan*, 5 T. R. 567; 6 Bro. P. C. edit.

If any particular form be prescribed the terms must be strictly complied with.

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Toml. 175); consequently, if the power is to be executed by a deed attested by two witnesses, it will be invalid if executed by one only; and if the conveyance is to be made with the consent of a particular person, such consent is essential to the valid execution of the power; and if the power is restricted to a limited interest, an appointment for any larger estate would be ineffectual.

### 19. *Executors and Administrators.*

Executors and administrators have an absolute power of disposition over the testator or intestate's goods and chattels, whether real or personal, and may therefore sell all such beneficial interests in terms of years as come to them in their representative capacity; consequently, a purchaser is not bound to see to the application of the purchase-money, even if the term be charged with a particular debt, or even if it be specifically bequeathed; because terms of years are subject to the payment of all debts in the first instance: (*Ewer* v. *Corbet*, 1 P. Wms. 148; *Nugent* v. *Giffard*, 1 Atk. 463.) Where there are several executors who all prove the will, they have a joint and several interest in all their testator's personal estate (Dy. 33; 1 Eq. Ca. Abr. 319); therefore a disposition by one of them only for a term is good. But it is otherwise in the case of administrators, who having a joint authority, one of them cannot convey alone, so as to bind his co-administrators: (*Hudson* v. *Hudson*, 1 Atk. 460.)

Executors and administrators have an absolute power of disposition over the estates they hold in those characters.

### 20. *Sheriff.*

The sheriff may seize leases or terms for years (*Palmer's case*, 4 Co. 74; Atkinson's Sheriffs' Law, 325), and it is impossible to suggest any pos-

Sheriff may seize and sell leasehold estates.

session of *a certain term* in lands that is not the subject-matter of a *fieri facias* (*Taylor* v. *Cole*, 3 T. R. 294; *Westmoreland* v. *Smith*, 1 Man. & Ry. 137; *Stevens* v. *Douston*, 1 B. & A. 230; *Doe dem. James* v. *Brawn*, 6 Taunt. 670); consequently, a term acquired by marriage may be taken in execution for the husband's debt. But notwithstanding that a sheriff may sell any certain term in lands, it appears doubtful whether, by the Statute of Frauds (29 Car. 2, c. 3), he can sell an estate *pur autre vie*, and the better opinion seems to be that he cannot do so: (Comb. 291.)

### 21. *Of Voluntary and Fraudulent Conveyances.*

What species of conveyances will be considered as simply voluntary.

The statute 27 Eliz. c. 4, has declared all conveyances to be void as against purchasers for valuable consideration (1 Mad. Pr. 273; *Fitzer* v. *Fitzer*, 2 Atk. 513; *White* v. *Sansom*, 3 *ib.* 412; *Hill* v. *Bishop of Exeter*, 2 Taunt. 82, 83); consequently, it is immaterial whether the purchaser has or has not notice of the settlement (*Pulvertoft* v. *Pulvertoft*, 18 Ves. 90; *Buckle* v. *Mitchell*, *ib.* 110; *Metcalfe* v. *Pulvertoft*, 1 Ves. & Bea. 84); the statute receiving the same construction in courts of equity as in courts of law, and comprehending copyhold as well as freehold property: (*Doe* v. *Bottriel*, 5 B. & A. 131; *Currie* v. *Nind*, 1 Myl. & Cra. 580.) So where a power is exercised under a voluntary settlement, and that power is afterwards executed for a valuable consideration, the purchaser will have the benefit of it: (*Hart* v. *Middlehurst*, 3 Atk. 377; 1 Mad. Prac. 272, 2nd edit.; see also *White* v. *Sansom*, 3 Atk. 412; *Hill* v. *Bishop of Exeter*, 2 Taunt. 82, 83.) But the settlor will not be allowed to defeat the settlement by a subsequent conveyance, upon a mere nominal consideration (*Doe* v. *Routledge*, Cow. 705; *Metcalfe* v. *Pul-*

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*vertoft*, 1 Ves. & Bea. 84), unless he had reserved to himself a power of revocation by the prior settlement, but which, if he were to do, he would render the settlement testamentary, and all the legal consequences of a will would attach upon it.

Distinction between voluntary conveyances and purchases taken in the names of wife and children.

Care must be taken to distinguish between a voluntary conveyance, and one taken in the name of the purchaser's wife and children, the latter of which is not considered to be within the meaning of the Statute of Fraudulent Conveyances (27 Eliz. c. 4), and therefore cannot be defeated by a subsequent conveyance to a *bonâ fide* purchaser for valuable consideration: (*Lady Gorge's case*, Cro. Car. 550, cited; *Evelyn* v. *Templar*, 3 Bro. C. C. 148; *Doe* v. *Manning*, 9 East, 59; *Doe* v. *Hopkins*, *ib.* 70; *Hill* v. *Bishop of Exeter*, 2 Taunt. 69; *Gully* v. *Bishop of Exeter*, 10 B. & C. 601.) Cases of this kind differ from the ordinary cases of conveyances taken in the names of third persons, in which, if no trusts are declared, the party to whom the estate is conveyed will hold in trust for the party advancing the money (*Gascoigne* v. *Thwing*, 1 Vern. 366; *Benger* v. *Benger*, 1 P. Wms. 780; *Ryall* v. *Ryall*, 1 Atk. 59; *Dyer* v. *Dyer*, 1 Cox, 92); because the husband and father is under a moral obligation to provide for his wife and children: (*Lloyd* v. *Lloyd*, 1 P. Wms. 607; *Back* v. *Andrews*, 2 Vern. 67, 128; *Kingdom* v. *Brydges*, *ib.* 67; see also *Ryder* v. *Kidder*, 10 Ves. 367.) In the case also of a purchase in the name of a child, whether such child be legitimate or illegitimate (*Beckford* v. *Beckford*, Lofft. 490); (if it be not otherwise provided for), it will be deemed an advancement for the child, and not a resulting trust for the father; unless some contemporaneous declaration can be proved, or some act is done to manifest an intention that the child should take as a trustee; and this must be done at the time of the conveyance,

for a subsequent act or disposition will not divest the gift (*Mumma* v. *Mumma*, 2 Vern. 19; *Dyer* v. *Dyer*, Wat. Cop. 216; *Crabb* v. *Crabb*, 1 Myl. & Kee. 511); nor will the presumption in favour of the child be rebutted, although the conveyance should be made in the joint names of the child and of the father (*Scroope* v. *Scroope*, 1 Cha. Cas. 27), or of the child and a stranger: (*Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; see also *Grey* (*Lord*) v. *Grey* (*Lady*), Finch, 338; *Elliott* v. *Elliott*, 2 Cha. Cas. 26; *Mumma* v. *Mumma*, *sup.*) Nor will it be material whether the purchase be of an estate in possession or reversion: (*Finch* v. *Finch*, 14 Ves. 50; *Dyer* v. *Dyer*, 2 Cox, 92; *Murless* v. *Franklin*, 1 Swanst. 13.) A purchase made by a grandfather in the name of a grandchild will also be good if the father be dead (*Ebrand* v. *Dancer*, 2 Cha. Cas. 26), but not otherwise, as the beneficial interest the child will take will depend upon whether or not the purchaser stands in *loco parentis* to him, which a grandfather, in the lifetime of the father, does not: (*Lloyd* v. *Read*, 1 P. Wms. 607; 1 Eq. Ca. Abr. 382.) It has been said that the presumption is not so strong where the purchase is made in the name of a daughter as in the case of a son, because daughters are not so often provided for by a settlement of lands as a son; but this distinction is not sustainable: (See 2 Mad. Pract. 117, 2nd edit.; *Lady Gorges' case*, Cro. Car. 550; *Bedwell* v. *Frome*, mentioned 2 Cox, 97.) In both instances, however, it will be requisite that the child should be unadvanced; yet a partial advancement (Rep. temp. Finch, 326), or, it seems, any advancement, if the father considers the child unadvanced (*Redington* v. *Redington*, 3 Ridg. P. C. 106), will be insufficient to raise a trust in favour of the father; nor will a reversion expectant on a life estate be sufficient to prevent

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the child from taking: (*Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.)

What acts of the father will repel the presumption in favour of child.

In some of the earlier cases it was considered, that, notwithstanding the father should himself take possession, and exercise acts of ownership over the purchased property, those circumstances would afford no evidence of a trust for him (*Lamplugh* v. *Lamplugh*, *sup.*; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 1 Atk. 386; *Stileman* v. *Ashdown*, 2 Atk. 480; *Redington* v. *Redington*, 3 Ridg. P. C. 106; see also *Elliott* v. *Elliott*, 2 Cha. Cas. 231); and in that case it must be intended that those acts were done in the character of guardian for the child (1 P. Wms. 113); but it has been held that, where the father received the rents and profits after the child was of age (*Lloyd* v. *Read*, 1 P. Wms. 608); or where the child was of age when the purchase was effected (2 Mad. Prac. 117; *Lex prætoria*, M.S.), the son would only be a trustee for him, as he also would be if the father and another person paid the purchase-money. But, at the same time, it appears that the laying out of money by the father in improving the property is not exercising such an act of ownership as will convert the son into a trustee: (*Shales* v. *Shales*, 2 Freem. 265.)

Practical remarks.

Upon the whole, therefore, it may be laid down as a general rule, that whenever a child takes for his own benefit, and not as a trustee for the father, it will not be in the power of the latter to defeat his child's claim by alienating the property even to a *bonâ fide* purchaser for valuable consideration: (*Lady Gorges' case*, Cro. Car. 550, cited in *Kingdon* v. *Brydges*, 2 Vern. 67; *Buck* v. *Andrews*, *ib.* 120.) But if the father was a trader, the purchase will not be protected (6 Geo. 4, c. 16, s. 73); unless he was solvent at

the time it was made; yet, if solvent then, his subsequent insolvency will not invalidate the settlement: (*Sagittary* v. *Hide*, 2 Vern. 44; *Russell* v. *Hammond*, 1 Atk. 13; *Holloway* v. *Millard*, 1 Mad. Rep. 113; *Battersbee* v. *Farrington*, 1 Swanst. 106.)

What persons will be considered as purchasers within the meaning of the statute 27 Eliz. c. 4.

It is not necessary, in order to enable a purchaser to obtain the protection of this statute, that the legal estate should have been conveyed to him, for an equitable interest, entitling a party by contract to clothe it with the legal title, makes such a party a purchaser in the eye of a court of equity (*Buckle* v. *Mitchell*, 18 Ves. 100); hence the purchaser of an equitable estate for a valuable consideration will be no more affected by a voluntary settlement, even with notice, than a purchaser of a legal estate; and in a very recent case (*Lister* v. *Turner*, March 12 and 23, 1846, 7 Law T. 3), although not long since a contrary doctrine prevailed (*Kerson* v. *Dorrien*, 9 Bing. 76), it was held, that where title deeds are deposited, by way of security, with a banker, the latter will be considered a purchaser within the meaning of this act, and, consequently, as such, entitled to avoid the settlement. But creditors, even by specialty, were not considered as purchasers within the 27th of Elizabeth; and although, under a prior statute (13 Eliz. c. 5), a voluntary conveyance was void against creditors, it was, nevertheless, formerly considered, that in order to impeach a settlement under the latter statute, the husband must be proved to have been indebted at the time: (*East India Company* v. *Clavill*, Gilb. Rep. 37; *Walker* v. *Burrows*, 1 Atk. 93; *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Lush* v. *Wilkinson*, 5 Ves. 384.) But this rule was relaxed in favour of the creditors in the more recent case of *Richardson* v. *Smallwood* (18 Ves. 55): see also *Townsend* v.

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*Westacott* (2 Beav. 340), in which case it was held, that in order to set aside a deed as fraudulent against creditors, it was not necessary to prove that the party was insolvent at the time, if it appeared that the intention was to delay the creditors.

## SECTION II.

### AS TO THE PURCHASER.

1. *Of Voidable Purchases.*
2. *Persons capable of purchasing, and yet incapable of holding.*
3. *Persons totally disabled from purchasing.*

What class of persons incapable of holding lands.

THERE are a certain class of persons who, although capable both of buying and holding lands, are nevertheless enabled at some future time to annul the purchase: others there are, who, though capable of purchasing, are incapable of holding; and some there are who are incapable of either holding or purchasing. Under the first class we may rank married women, infants, and persons of unsound mind. Under the second, aliens, attainted persons, corporations (whether lay or ecclesiastical), and, until recently, persons professing the Roman Catholic religion. Under the third, trustees, solicitors of vendors, commissioners, assignees, or the solicitor under a commission or fiat in bankruptcy, the committee of a lunatic, auctioneers, creditors who have been consulted as to the mode of sale, the governors of a charity, commissioners under inclosure acts, executors and administrators, all of whom are, except under certain restrictions which will be mentioned hereafter, incapable of becoming the purchasers of property with which they have anything to do in those respective characters.

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### 1. *Of Voidable Purchases.*

Married women.

A married woman may purchase an estate without her husband's consent, and the conveyance is good during the coverture, unless, as he undoubtedly may, he thinks proper to annul it: (Co. Litt. 3; 2 Blac. Com. 293; *Barnfather* v. *Jordan*, Doug. 452; *Garband* v. *Allen*, 1 Ld. Raym. 224; *Francis* v. *Wizzell*, 1 Mad. Rep. 258.) But after the husband's death, the wife, in case she survive him, may avoid the sale, whether he has assented to it or not, as may also her heirs; and this whether she dies before or after her husband, unless in the latter event she should do any act to express her consent or agreement.

Infants.

An infant, if he purchases during his minority, may waive any contract or conveyance made in pursuance of it when he comes to full age; or if he do not then actually agree to it, and die without affirming it, his heirs may waive the purchase: (Co. Litt. 2, *b;* 2 Blac. Com. 292; *Ketsey's case*, Cro. Jac. 320; 1 Roll. Abr. 731; *Holmes* v. *Blogg*, 8 Taunt. 508.) But still the purchase is not totally void, as it is in the power of the infant either to confirm or rescind it, upon attaining his majority, and if once confirmed by him it cannot afterwards be annulled. This confirmation may either be expressly done by an avowed confirmation, or by the performance of certain acts from which such confirmation may reasonably be implied (*Franklin* v. *Thornbury*, 1 Vern. 132); as, for example, by retaining possession of the purchased lands, or receiving the rents and profits, or by cutting down timber, or exercising other acts of ownership over the property: (*Smith* v. *Lowe*, 1 Atk. 489.)

Lunatics and idiots.

The acts of a lunatic or *non compos* may, as we have already seen, be set aside, either by

himself, on recovering his senses, or by his committee, or his heirs, after his death (as to which, see *ante*, p. 157.)

## 2. *Persons capable of purchasing, and yet incapable of holding.*

Aliens.

An alien is not disabled from purchasing lands, but he is incapable of holding them afterwards, because, upon office found, they become forfeited to the crown: (2 Blac. Com. 293.) The only exception to this rule is, a lease of a dwelling-house and buildings for the purpose of habitation and trade (7 Rep. 17), which an alien friend will be entitled to hold for those purposes. But he cannot protect himself as to the possession of any other real property, by purchasing in the name of a trustee. The only means by which he can be enabled to hold real property in any part of the United Kingdom, is, by being made a denizen, or becoming naturalized, which will enable him to retain the possession of all lands acquired by him subsequently to those events: (Co. Litt. 2, *b.*) It was, indeed, not long since the prevailing opinion that the naturalization of an alien enabled him to hold lands acquired previously (Golds. 29, pl. 4), though, by becoming a denizen, he would only be entitled to hold lands acquired afterwards; but more recent decisions have established that there is no such distinction, and that a naturalized alien is no more capable than a denizen of holding previously acquired lands: (see Mr. Rudall's note to Hawk. Abr. Co. Litt. 17, n. 38.)

Attainted persons.

Persons attainted of treason, felony, or *præmunire*, are incapable of holding lands from the time of the offence committed: (Co. Litt. 42; 2 Blac. Com. 290.) Hence, although they may purchase, it will be for the benefit of the crown, or

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the lord of the fee, according to the nature of the crime: (Co. Litt. 2; 15 East, 463.)

Corporations.

Corporations, whether lay or ecclesiastical, aggregate or sole, are, without an express licence to alien in mortmain, disabled from holding any lands they may have purchased in their corporate capacity; which lands will become forfeited to the lord of the fee; and in case he fails to avail himself of the forfeiture within the prescribed time, the lands will go to the crown. Hence the inhabitants or parishioners of any place are disabled from holding any lands purchased by them under those characters: (Co. Litt. 3 A.) The only exception to this rule seems to be the case of guardians and overseers of the poor purchasing lands for the purpose of a workhouse, which they are expressly enabled to do by act of Parliament (3 & 4 Will. 4, c. 76.)

Roman Catholics.

Until within the last few years, persons professing the Roman Catholic religion who neglected to take the oath as prescribed by the stat. 31 Geo. 3, c. 32, were disqualified from holding lands, except for the benefit of their Protestant next of kin (stat. 43 Geo. 3, c. 40); but by statute 10 Geo. 4, c. 7, s. 23, a Roman Catholic subject is enabled to hold any real or personal estate, without being required to take any other oaths than may be required to be taken by any other of Her Majesty's subjects.

### 3. *Persons totally disabled from purchasing.*

What persons are totally disabled from purchasing.

The total disability to purchase arises from two causes; first, that the parties whom it embraces cannot be both buyers and sellers; and, secondly, with a view to prevent fraud, which persons situated in certain relations might otherwise be tempted to be guilty of. Hence a trustee is not permitted to become a purchaser from himself of the whole or any portion of the trust

property (*Herne* v. *Meers*, 1 Vern. 465; *Ayliffe* v. *Murray*, 2 Atk. 59; *Fox* v. *Mackreth*, 2 Bro. C. C. 400; *Coles* v. *Tregothic*, 9 Ves. 234; *Ex parte Bennett*, 10 Ves. 3; *Morse* v. *Royall*, 12 *ib.* 372), even at a sale by public auction (*Whelpdale* v. *Cookson*, 1 Ves. sen. 9; *Lister* v. *Lister*, 9 Ves. 63.; *Sanderson* v. *Walker*, 13 *ib.* 602; *Downes* v. *Glazebrook*, 3 Mer. 267); which disability extends also to his solicitor: (*Downes* v. *Glazebrook*, *supra*; *White* v. *Fuzzl*, before V.-C. Leach, June 29, 1818, referred to in 2 Mad. Prac. p. 110, 2nd edit.) But after a trustee is discharged from his trust, he will no longer be debarred from purchasing of his *cestui que trust*; but then he purchases subject to the liability of having the sale set aside, if the *cestuis que trust* were to say within a reasonable time that they were dissatisfied with the purchase, and can also show that it would be for their advantage that this should be done. But, at the same time, if the trustee's conduct was fair and honourable, or rather, if there had been no unfairness on his part, he would be entitled to a return of his purchase-money, and all reasonable costs incurred by him in the course of the transaction: (*Campbell* v. *Walker*, 5 Ves. 678; see also *Ayliffe* v. *Murray*, 2 Atk. 58; *Crowe* v. *Ballard*, 3 Bro. C. C. 117; 1 Ves. 215.) And upon the whole it seems, that, notwithstanding a trustee cannot purchase of himself, he is allowed to purchase from his *cestui que trust*, provided there is a distinct and clear contract ascertained to be such after a jealous and scrupulous examination of all the circumstances, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee: (*Coles* v. *Tregothic*, 9 Ves. 246; *Morse* v. *Royall*, 12 Ves. 373.) And where an estate is vested in trustees upon trust for sale, and the trustee is desirous of becoming a purchaser, he

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may file a bill for the purpose of carrying the trusts into execution under the direction of the court, and upon the sale apply to the court for leave to become the purchaser upon offering to give more than any other person: (*Campbell* v. *Walker*, 5 Ves. 381.) With respect to a trustee for creditors purchasing any of the trust property on his own account, it appears doubtful whether the purchase could be sustained, unless with the concurrence of every one of the creditors; for though it has been said that if a majority of the creditors agree, it will be sufficient (*Whelpdale* v. *Cookson*, 1 Ves. sen. 9), the correctness of this *dictum* is very questionable.

Executors.

With respect to executors, it seems to have been formerly considered, that although an executor renounced he was nevertheless disabled from purchasing, on the ground that he was still privy to the will: (Co. Litt. 113 a; Bard. 14; Kielw. 207; Anders. 27.) But this doctrine has been overruled at law: (*Barber* v. *Mackintosh*, 1 Bing. Rep. 50.) Still it seems that in equity a purchase of this kind would not be supported unless it could be shown that it was for the benefit of the parties claiming under the will.

Attorneys and solicitors.

With respect to an attorney's purchasing of his client, the rule is, that, strictly speaking, he is unable to do so as long as that relation subsists between them, yet when that relationship is dissolved, this disability will be removed. Where sales of this kind have been impeached, there has been some fraud or concealment on the part of the attorney; as, for example, he has purchased in the name of a third party, or by some means or other has contrived to conceal the fact of his being the actual purchaser; and when this is the case it would afford sufficient ground for rescinding the sale. In a recent case, indeed, where a solicitor purchased from his client in the name of a trustee, although at a price at

which the vendor himself had authorized it to be sold, yet as the solicitor concealed the fact that he himself was the purchaser, the sale was set aside as fraudulent, notwithstanding there had been a possession of upwards of forty years under the conveyance: (*Trevelyan* v. *Charter*, Rolls, Jan. 1835, *afterwards affirmed in the House of Lords.*) And whenever an attorney or solicitor purchases from a late client, he should see that the latter employs some other attorney; otherwise, by mixing together the supposed character of attorney and purchaser, he will throw upon himself the onus of proving that he has given his client all that reasonable advice against himself he would have given him against any other person: (*Gibson* v. *Jayes*, 5 Ves. 266; *Wood* v. *Downes*, 18 Ves. 120; *Montesquieu* v. *Sandys*, *ib.* 302; *Pane* v. *Allen* (*Lord*), 2 Dow. 289.)

Commissioners, assignees, and solicitors, under a commission or fiat in bankruptcy, are, as I have already remarked, disabled from purchasing the bankrupt's property, as are also the assignees of an insolvent debtor (*Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 *ib.* 617; *Ex parte Lacey*, *ib.* 652; *Ex parte James*, 8 *ib.* 337; *Ex parte Bennet*, 10 *ib.* 381; *Ex parte Morgan*, 12 *ib.* 6; *Ex parte Andrews*, 2 Rose, 410; see also Henl. Bkt. Law, 216); neither are the committee of a lunatic permitted to purchase the lunatic's estate (*Wright* v. *Proud*, 13 Ves. 156); nor can auctioneers purchase the estate they are employed to sell: (*Whelpdale* v. *Cookson*, 1 Ves. sen. 9; *Lister* v. *Lister*, 6 Ves. 631; *Saunderson* v. *Walker*, 13 *ib.* 602.) Executors or administrators are also disabled from purchasing the estate or effects of their testator or intestate: (*Hall* v. *Hallett*, 1 Cox, 134; *Burden* v. *Burden*, 1 Ves. & Bea. 170.) This disqualification does not, however, extend to a residuary legatee (*Hooper* v. *Goodwin*, Cooper, 95), nor to the

Commissioners and assignees of bankrupts, &c.

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*As to the purchaser.*

next of kin, nor to the heir at law of a testator who has devised away his real estate.

Mortgagee.

Whatever opinions may formerly have prevailed, it is now clearly settled that the relation and mortgagor and mortgagee does not preclude the latter from purchasing the equity of redemption: (*Skinner* v. *Stacey*, 1 Wils. 80; *Goodtitle* v. *Pope*, 7 T. R. 185; *Ex parte Marsh*, 1 Mad. Rep. 48.) The cases in which transactions of this kind have been seemingly impugned, have been those in which the mortgagee has been a trustee for sale (*Downes* v. *Glazebrooke*, 3 Mer. 200), who could not of course sell to himself; or where he has taken some undue advantage of his situation: (*Gubbins* v. *Creed*, 2 Sch. & Lef. 214; *Webb* v. *Rorke*, *ib.* 660; *Hicks* v. *Cooke*, 4 Dow. 10, 28.)

# CHAPTER III.

## ON THE PREPARATION AND DELIVERY OF THE ABSTRACT.

I. PRELIMINARY OBSERVATIONS.

II. PRACTICAL DIRECTIONS FOR PREPARING THE ABSTRACT.

1. *Heading of the Abstract.*
2. *Root or Origin of the Title.*
3. *When a double Abstract will be necessary.*
4. *How the various Documents should be set out.*
5. *Deeds, how to be abstracted.*
6. *Attendant Terms.*
7. *Wills.*
8. *Fines and Recoveries.*
9. *Commission of Fiat in Bankruptcy.*
10. *Insolvency.*
11. *Acts of Parliament.*
12. *Judgments.*
13. *Decrees.*
14. *Descents.*
15. *Administration.*
16. *Matters of Fact.*
17. *Cancellation, Alteration, or Erasure of Documents.*
18. *Statement at Foot of Abstract.*

III. ABSTRACTS OF LEASEHOLD PROPERTY.

IV. ABSTRACTS OF COPYHOLDS.

## SECTION I.

### PRELIMINARY OBSERVATIONS.

Vendor's solicitor should deliver abstract within the time appointed.

AFTER the contract is duly signed, the next step for the vendor's solicitor to take is, to deliver an abstract to the purchaser or his solicitor, either at or within the time appointed by the contract or conditions of sale; and this the former should take care to do, as an omission of this kind would avoid the contract at law (*Calonel* v. *Briggs*, 1 Salk. 112; *Lock* v. *Wright*, 8 Mod. 40; *Powell* v. *Pillett*, Gilb. Rep. 188; *Hamilton* (*Duchess of*) v. *Hamilton* (*Duke of*), Grounds and Rudiments of Law and Equity, 4; *Berry* v. *Young*, 2 Esp. N. P. C. 640), and in equity also, if time is made part of the essence of the contract: (*Butcher* v. *Hinton*, 1 Cha. Cas. 302; *Keen* v. *Stukeley*, Gilb. Rep. 155; *Pope* v. *Roots*, 7 Bro. P. C. 184; *Feversham* (*Earl of*) v. *Watson*, Rep. temp. Finch, 445; 2 Freem. 35; *Hatton* v. *Long*, *ib.* 12; *Lloyd* v. *Collett*, 4 Ves. 689, n.; *Radcliffe* v. *Warrington*, 12 *ib.* 326; *Hudson* v. *Bartram*, 3 Mad. Rep. 440; *Bochin* v. *Wood*, 1 Jac. & Walk. 419; *Withy* v. *Cottle*, 1 Turn. 78; *Lechmere* v. *Brazier*, 2 Jac. & Walk. 239; *Levy* v. *Lindo*, 3 Mer. 84; see also 1 Mad. Prac. 416, 2nd edition; 1 Fonbl. Eq. 394.) Even where no precise time is stipulated for the delivery of the abstract, it will be necessary that it should be delivered in a convenient time; but what limit is to be so considered is involved in considerable doubt. To avoid any questions from arising about the matter, the vendor's solicitor should in every instance use due diligence in forwarding the abstract; for a delay on

his part, to say the least of it, will afford a pretext for the same line of conduct on the part of the purchaser, which may often, as I have already remarked (see *ante*, pp. 4, 5), cause great inconvenience to the vendor.

Purchaser's solicitor should demand abstract if not delivered at appointed time.

And as, on the one hand, the vendor's solicitor should be careful to deliver the abstract in proper time, so, on the other, the purchaser's solicitor should be equally active; and when a time is appointed for the delivery, the latter should make a point of demanding it on or before the time. It is not solely incumbent on the vendor to move by making a tender of the abstract; something also is incumbent on the purchaser to ask for it (*Guest* v. *Homfray*, 5 Ves. 283); and any laches on the part of the latter to do this may afford sufficient ground for rescinding the contract; and this even where no time is appointed for the delivery of the abstract, if the purchaser's solicitor permits a considerable time to elapse without asking for it: (*Jones* v. *Price*, 3 Anstr. 924; *Harrington* v. *Wheeler*, 4 Ves. 686; *Lilley* v. *Deschampes*, 13, *ib.* 225.)

By whom the abstract is to be prepared.

In ancient days the practice seems to have been to deliver over the title-deeds themselves to the purchaser, and the abstract was prepared from such deeds by his solicitor, and at his own expense: (*Temple* v. *Brown*, 6 Taunt. 60.) This practice has, however, been long since done away with (1 Prest. Abs. 34), and the established rule now is for the vendor to defray the cost of the abstract, which is prepared by his own solicitor. The abstract only, and not the title-deeds, is delivered to the purchaser's solicitor, who afterwards is allowed access to such title-deeds in order to examine them with the abstract, which latter expense is borne by the purchaser. Formerly, also, it seems to have been customary for counsel to compare the title-deeds with the abstract; but this practice is now disused, a duty

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of that kind being considered as falling more properly within the province of solicitors than counsel. In former times, also, it was by no means an unfrequent practice to employ counsel to prepare the abstract; but this is not done now, that task devolving wholly upon the solicitor; and a very important task it is, as it requires not only the strictest attention, but also an acquaintance with the laws of real property, and the nature and operation of the various assurances by which it may be transmitted from one person to another.

## SECTION II.

### PRACTICAL DIRECTIONS FOR PREPARING THE ABSTRACT.

1. *Heading of the Abstract.*
2. *Root or Origin of the Title.*
3. *When a double Abstract will be necessary.*
4. *How the various Documents should be set out.*
5. *Deeds, how to be abstracted.*
6. *Attendant Terms.*
7. *Wills.*
8. *Fines and Recoveries.*
9. *Commission or Fiat in Bankruptcy.*
10. *Insolvency.*
11. *Acts of Parliament.*
12. *Judgments.*
13. *Decrees.*
14. *Descents.*
15. *Administration.*
16. *Matters of Fact.*
17. *Cancellation, Alteration, or Erasure of Documents.*
18. *Statement at the Foot of the Abstract.*

### 1. *Heading of the Abstract.*

How an abstract usually commences.

THE abstract usually commences with a heading setting out the name of the owner; the nature and tenure of the property; the estate or interest he takes in it; as also the name and local description of the premises. When the

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*Practical directions for preparing the abstract.*

description of the parcels is short, it is sometimes fully set out in this place, and merely referred to in abstracting the subsequent documents; but the more frequent practice is to set out the parcels *verbatim* from the first abstracted deed, and to refer to them shortly in those subsequently abstracted.

### 2. *Root or Origin of the Title.*

Time to which the title should be carried back.

In framing an abstract, the title should be carried back to some document not less than sixty years old, that time having, for many years, been considered as the established period from which a purchaser is entitled to require his title to commence. Some able writers have, indeed, lately contended that the recent Statute of Limitations (3 & 4 Will. 4, c. 27) has shortened this period, and that, consequently, it would be a convenient rule to take a middle course, and to treat fifty years as a sufficient time to trace back a title in ordinary cases. There is nothing, however, in the statute to warrant the introduction of any rule of this kind; for though it renders the security of sixty years better than it was before, because the time within which suits may be instituted is thereby shortened; still another ground of the rule, viz., the duration of human life, is not affected by it; and the objection to titles on the ground that the conveying parties might have been mere tenants for life, or that there may be equitable rights, as between trustees and *cestuis que trust*, still exists; although, in the last-mentioned instance, the statute will begin to run from the time a conveyance is made to a purchaser: (3 & 4 Will. 4, c. 27, s. 25.) Whatever, therefore, might have been the intention of the Legislature in passing this Statute of Limitations (3 & 4 Will. 4, c. 27), it has not led to the result of

New Statute of Limitations has not shortened the period from which

shortening the period from which titles were to be deduced: (*Cooper* v. *Emery*, 1 Phill. 388; *Hodgkinson* v. *Cooper*, Rolls, Jan. 28, 1846; 6 L. T. 451.) And even a sixty years' title may be insufficient unless its origin can be shown. It also occasionally becomes necessary to carry back the title beyond that period; as, for example, where a deed, though dated more than sixty years since, operates as an execution of a power contained in some previous deed or will, in which case the instrument creating the power should be abstracted; and the like doctrine holds with respect to a settlement made in pursuance of marriage articles, where the articles themselves must necessarily be inspected in order to satisfy the purchaser that the settlement was made in accordance with them: (1 Prest. Abs. 70.) But where a recovery has been suffered more than sixty years ago, it will be no objection to the title that the deed or will by which the entail was created cannot be produced. And generally, where an abstract commences with a conveyance to a purchaser, and a possession of sixty years can be shown under it, it will be considered as sufficient evidence that the party making such conveyance had a lawful right to do so: (1 Prest. Abs. 16.)

Titles are to be deduced.

As a general rule, therefore, it will be sufficient to commence an abstract with some purchase-deed, settlement or will, at any date at or beyond sixty years, without incumbering the abstract with any of the previous documents. Mr. Preston, with his usual accuracy and discernment, remarks, that a deed of conveyance to the person who was the first purchaser affords the strongest presumption that the title was considered good at that time, and that the person who made it was the absolute owner in fee-simple; but that when a title cannot be taken up by a deed of this kind, the next best instrument

General rule respecting commencement of title.

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for that purpose is a will, or some settlement made by a person acting as the absolute owner of the fee-simple. "This document," the same learned writer observes, "with possession consistent with the evidence of title, furnishes the like presumption of a good title; and the presumption is greatly strengthened, if there has been a frequent change of ownership without any adverse claim."

Pedigree should accompany abstract.

As often as a title depends on a descent, a pedigree, authenticated by such evidence as would be sufficient to support the title in case of an adverse claim, should accompany the abstract: (1 Prest. Abs. 43.)

Titles to advowsons.

In the case of advowsons, it was always considered necessary to trace back the title farther than in other kinds of real property. The reason of this was, that the title of an advowson might not have been in possession, nor an opportunity occurred of trying the title to it within the sixty years. According to the authority of Sir E. Coke, there was a parson of one of his churches who had been incumbent there upwards of fifty years. Sir William Blackstone also mentions (3 Blac. Com. 251) that the last two incumbents of Chelmsford-cum-Farnborough continued one hundred and one years; so that, as the learned commentator proceeds to remark, had the last of these incumbents been the clerk of an usurper, or had been presented by lapse, it would have been necessary and unavoidable to the patron, in case of a dispute, to have recurred back above a century, in order to show a clear title and seisin by presentment, and admission of the prior incumbent. He then adds, that as the title of advowsons is rendered more precarious than that of any other hereditament, it might not perhaps be amiss if a limitation were compounded of a length of time and number of avoidances together; as, for instance, if no seisin

were admitted or alleged in any writs of patronage after sixty years, and three avoidances were past. These wise suggestions, after a lapse of many years, and having been read in the interim by every lawyer in the land, were at length attended to, and the object of them carried into effect by the late Statute of Limitations (3 & 4 Will. 4, c. 27), by the 30th section of which it is enacted that no advowson shall be recovered but within three incumbencies adverse to the right of presentation, or sixty years. By the section next immediately following (sect. 31), it is, however, provided that, although incumbencies by reason of lapse will be adverse presentations within the meaning of the act, yet that such incumbencies as arise from the promotion of the prior incumbent to a bishopric are not to be so considered; and one hundred years' adverse possession is the extreme limit now allowed under that statute for the recovery of an advowson. The title, therefore, to an advowson, should now be carried back to a period of not less than one hundred years; to which title a list of presentations should be annexed, to show that acts of ownership have been duly exercised in conformity with such right of presentation.

Titles relating to tithes.

Notwithstanding the original right to tithes is founded on a grant from the crown at the dissolution of the monasteries, no one ever now thinks of calling for a title commencing and regularly deduced from so ancient a time. A clear sixty years' title is all a purchaser of this kind of property is entitled to require, or to compel a vendor to give.

Documents should be abstracted according to the priority of their respective dates.

The various documents by which the title is to be supported should be inserted in the abstract according to the order of their respective dates, unless the property has come through different channels; in which case the course of each separate portion must be traced separately

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until the ownership of the whole of them unites in the same party. If, for instance, there be three estates, A., B., and C., all held under different titles, which have been purchased by D., then the title of each of these estates must be traced separately down to the conveyance of the whole of them to D., after which they will all three become consolidated in one common title, and from that period they will all be traced together as long as the entire property continues to flow on in the same course. To accomplish this, all the documents "As to A.," must be abstracted down to D.'s purchase-deed. Next the documents "As to B.," and then the documents "As to C.," down to the conveyance to D.; which being done, then insert a heading, "As to all said premises," commencing with the first conveyance, or other disposition from D. to any other party. The like observations are also applicable where an estate in joint tenancy or coparcenary has been severed, until the whole estates unite again in one common title.

### 3. *When a double Abstract will be necessary.*

Where lands are taken, exchanged, or allotted under Inclosure Acts, a double abstract will be necessary.

In some instances an abstract relating only to the property intended to be conveyed, will not alone suffice; as where lands have been taken in exchange (4 Rep. 121; Prest. Abs. 87), or allotted under inclosure acts, in both of which instances an abstract must not only be furnished of documents of title relating to the estate sold or allotted, but of those also of the estates given in exchange, or of the original estates in respect of which the lands were allotted. The reason why a double title is required in the first instance, is, because the foundation of an exchange was an implied warranty, which engendered the right of entry in case of eviction: (Shep. Touch. 290; Finch. L. 27; Shep. Pract. Couns. 2.) In the

second instance, because the allotted lands became liable to the uses of the estates in respect of which they were allotted. The statute of 4 & 5 Will. 4, c. 30, ss. 24, 25, has, however, made some important alterations in the law in the latter case; as that statute, by expressly changing the uses, takes away any right of eviction after an exchange made of lands in common fields under the powers of that act; and by a still more recent enactment (8 & 9 Vict. c. 106), deeds of exchange have no longer the effect of creating any warranty, or right of re-entry, or implied covenant by implication. But this statute is only prospective, and will not affect assurances made previously. As to these, therefore, a double abstract will still be necessary.

Double abstract necessary in titles of enfranchised copyholds.

Another instance in which an additional abstract will be required, is in the case of an enfranchised copyhold estate, when the title of the lord to the freehold must be shown, in addition to that of the copyholder, previously to his enfranchisement.

In sales of leaseholds vendor must produce lessor's title unless there be some stipulation to the contrary.

In the case of leaseholds also, unless there is some express agreement or stipulation to the contrary, the vendor must be prepared to produce his lessor's title, otherwise he cannot compel the purchaser to complete the contract: (*Rosewell* v. *Vaughan*, Cro. Jac. 196; *Lysney* v. *Selby*, 2 Lord Raym. 218; *Keech* v. *Hall*, Doug. 21; *Waring* v. *Macreth*, 11 Ves. 343; *Fielder* v. *Hooker*, 2 Mer. 424; *Purvis* v. *Rayner*, 9 Pri. 488; *Souter* v. *Drake*, 5 B. & A. 992.) It may be proper also to remark, that the purchaser of leaseholds is equally entitled to a clear sixty years' title as if he were a purchaser of the fee-simple itself: (*Hodgkinson* v. *Cooper*, 6 L. T. 451.) The title, also, should be regularly deduced from the original lease by means of the intermediate assignments, though, if these cannot be produced, their loss may, in some instances be supplied by the recitals: (*Doe* v. *Maple*, 3 Bing. N. C. 832.)

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In the case also of a grant of mines, where they form a distinct property from the freehold and inheritance of the land, a double abstract will be necessary; the one to show the right of the vendor to transfer his interest, the other to show the right of the original grantor to sever the mines from the lands. It should also be distinctly stated whether the right of mining is to be extended to every kind of ore or mineral or restricted to some particular kinds only. For it not unfrequently happens that one person may be entitled to one kind of mineral, and other persons to other kinds; hence one person may be entitled to the iron, another to the limestone; and where minerals of the same species and in the same lands may belong to different parties; one stratum or seam of coal may belong to one party, and another seam to another. But notwithstanding a double abstract will generally be necessary to show a title to mines and minerals, when the ownership is distinct from the lands, still, where there has been a considerable length of possession and incontrovertible acts of ownership, a title may be made out without showing how such right originally accrued: (*Barnes* v. *Mawson*, 1 M. & S. 841.) The evidence ought, however, to be very clear and satisfactory as to the acts of ownership, as in all cases, an adverse claim to the mineral must be clearly established against the owner of the surface. Such a possession must, under the recent Statute of Limitations, have endured for the space of twenty years, and in case of successive disabilities for forty years from the time when a right of action accrued: (3 & 4 Will. 4, c. 27; Bainbridge on Mines.)

In a grant of mines where they form a distinct property from the freehold, a double abstract will be necessary.

As to minerals arising out of copyholds.

With respect to minerals arising out of copyholds, the lord, in the absence of a special custom, is entitled to the right of property of them, whilst the right of possession remains in the tenant; so that neither the one nor the other can work them except by mutual consent: (Bain-

bridge, 101; *Player* v. *Roberts*, W. Jones, 243 ; Gilb. Ten. 327 ; *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406 ; *Townler* v. *Gibson*, 2 T. R. 704 ; *Grey* v. *Northumberland* (*Duke of*), 13 Ves. 236 ; *Whitechurch* v. *Holworthy*, 19 Ves. 214 ; 4 Mau. & Selw. 340 ; *Browne* v. *Taylor*, 10 East, 189 ; *Lewis* v. *Branthwaite*, 2 B. & A. 437 ; see also *Mitchell* v. *Dors*, 6 Ves. 147.) Still, for all this, either the copyhold tenant or the lord may by special custom have acquired an exclusive right to the minerals. The former may have gained a right of property as well as of possession, and the latter may still have retained his original power to enter and take possession of the property : (*Rowe* v. *Brenton*, 8 B. & C. 737, Hale Rep. 15.) When minerals in copyhold lands belong to the lord of the manor they do not form an inheritance distinct from the freehold, but are part of the demesnes of the manor. But in the grant of wastes, or in the enfranchisement of copyhold lands, the mines and minerals will not be reserved by the common reservation of all seignories, royalties and jurisdictions, but they must be mentioned in express terms, otherwise the mines will become the property of the owners of the surface, and part of the inheritance, and all preceding contracts will enure for their benefit : (*Townley* v. *Gibson*, 2 T. R. 701 ; Bainb. 19.)

When the property is held by different tenures separate abstracts must be supplied for each.

When the property consists of lands of different tenure ; as where some are freehold and others leasehold, or of copyhold or customary tenure, then the purchaser should be furnished with a separate abstract of each distinct species of property.

Advowson.

In the case of an advowson, the purchaser will be entitled to a statement of the presentations, and by whom made ; also the names of the clerks presented during the period of time comprised in the abstract, which, as I have already stated,

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ought to extend over a period of one hundred years.

4. *How the various Documents should be set out.*

Every document relating to the title should be set out in the abstract.

The vendor's solicitor must be especially careful to set out every document in the abstract that can in any way affect the title ; as he will render himself personally liable for the consequences, if he suppresses any incumbrances, or keeps back any document whatever, by which the real and true nature of the title may be revealed : (*Arnot* v. *Biscoe*, 1 Ves. sen. 96 ; *Burroughs* v. *Lock*, 10 Ves. 475 ; *Bowles* v. *Stewart*, 1 Sch. & Lef. 227 ; 1 Prest. Abs. 39.)

Practical instructions for arranging the clauses.

In order that the various clauses may the more readily catch the reader's eye, it has long been the practice to distinguish the different parts of the abstracted documents by setting them out within margins, varying from one another in breadth ; hence an ordinary abstract has commonly four or five marginal spaces. In the outer space, or margin, merely the date of the instrument is inserted. In the first inner space, or margin, if the documents are deeds, the title of them, as "Indentures of Lease and Release," with the names and additions of the conveying parties, are set out ; the recitals are commonly set out in the second ; the *testatum* in the first ; the granting part in the second ; the parcels in the fourth ; the general words in the fifth ; the *habendum* in the second ; the declaration of uses in the third ; the powers, if any, in the second, as also the covenants ; and the clause noticing the attestation and indorsement of receipt of the purchase-money in the fourth. There is not, however, any precise rule laid down as to the manner in which the respective clauses are to be set out. The chief object of the arrangement is to enable the reader, at a single glance, to discover any particular portion of an abstracted

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document ; a method which very considerably assists the investigation of a lengthy abstract, where it not unfrequently becomes necessary to refer backwards and forwards from one part of it to another.

As to wills.

Wills are commonly set out within the inner or first margin ; but with all due deference to those experienced practitioners who have so long adhered to this plan, I think it would be a far better one to confine it, at any rate, within the limits of the second margin. Few instruments call for more frequent or lengthy marginal remarks from the peruser of an abstract than a will, on account of the various objects it embraces, and not unfrequently from the inartificial manner in which it is penned ; so that it often happens that these observations are too voluminous to be contained in the remaining margin, and are consequently obliged to be extended to the back of the sheet, or carried on in the margin of the next. The marginal remarks of the party perusing the abstract ought to be placed as near as possible to the particular clause to which they refer.

Acts of Parliament, fines, recoveries, &c.

Acts of Parliament, as also chirographs of fines and exemplifications of recoveries, are usually set out within the first margin ; as are also most matters of fact which in any way concern the title ; such as marriages, births, deaths, descents, intestacies, failure of issue, or the like. In abstracting an act of Parliament the date of the royal assent must now be stated. Before the statute 33 Geo. 3, c. 13, an act of Parliament took effect from the first day of the session in which it was passed : (*Panter* v. *Attorney-General*, 6 Bro. P. C. 486 ; *Latless* v. *Holmes*, 4 T. R. 660.)

Order in which the respective documents should be abstracted.

The various documents, as also such matters of fact as are important to the title, should be abstracted according to the order of their respective dates. If there are two documents of the same date, they should then be abstracted

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according to the order in which they may be presumed to have been executed; as for example: if lands were conveyed to trustees by one deed, upon trusts declared by another deed of the same date, the deed of conveyance to the trustees is the instrument which should be first abstracted.

### 5. *Deeds, how to be abstracted.*

As to the date and parties, and how the latter are to be described.

In abstracting a deed, the date and title of the deed are first set out; next come the names of the parties, who should be described by their proper Christian and surnames, with the addition of esquire, gentleman, yeoman, &c., as the case may be, to which is frequently added their place of residence; and if they are described in the deed as filling any particular character, as heir, executor, trustee, &c., they should be so described in the abstract. This is sometimes done where the parties act in either of the above-mentioned characters, but are not so described in the deed; but, under such circumstances, the additional description should be inserted within brackets, in order to show that the parties were not so described in the abstracted deed.

Amount of stamps of abstracted deeds should be set out in the abstract.

Although it is not often done, I consider that, in preparing the abstract, the stamps of the abstracted deeds should be mentioned underneath the date, in order that the purchaser's solicitor may at once ascertain whether the duty affixed be correct or not. This often becomes a matter of high importance, and yet it is one that the attention of counsel is rarely drawn to, in investigating a title.

How recitals contained in documents are to be abstracted.

After the description of the parties come the recitals. These should be set out in the order in which they occur in the abstracting deed, which, though they may often be considerably abbreviated, should yet be set out with sufficient fulness to explain their whole purport; but when once fully given, it will be sufficient, whenever it

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again becomes necessary to notice such recital, to state simply the name and date of the recited instrument (*e. g.*) "Reciting before abstracted indres. of le. and rele. of the 20th and 21st days of October, 1803." Where brevity in an abstract is desirable, several recitals may be noticed very shortly; as, "Reciting before abstracted indres. of le. and rele. of 20th and 21st days of October, 1803. *Also reciting* the before abstracted indre. of demise of the 1st day of December, 1804; the indre. of appointment of the 29th day of June, 1805; the indres. of le. and rele. of the 28th and 29th days of September, 1814; the indre. of bargain and sale of the 1st day of July, 1817; and the indres. of le. and rele. of the 11th and 12th days of October, 1823; to the effect hereinbefore abstracted."

How the *testatum* of deeds should be abstracted.

The *testatum* or witnessing part should set forth the nature of the consideration, and where money is required to be paid in any particular manner; as in pursuance of the terms of any trust or power, then that part of the deed which points out such particular mode of application should be fully abstracted, in order to show that all the necessary requisites have been complied with: (1 Prest. Abs. 78.) Where there is a mere nominal consideration, as 5*s.*, or a peppercorn, it should be shortly stated.

Granting clause.

The granting clause should contain all the words of conveyance that are employed in the deed; as, "grant, bargain, sell, alien, release, ratify, and confirm," and not simply their effect and operation; but where the instrument, as was generally the case formerly, speaks both in the past and in the present tense, it will be unnecessary to repeat the operative words. A learned writer on this subject, indeed, very properly observes, that it would conduce to accuracy, as well as facilitate the perusal of abstracts, if the contents of documents were abridged merely,

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without any attempt being made to convert the present into the past tense; an operation which often gives rise to ambiguity, where it is not performed with considerable care and skill: (see 1 Sweet Prec. Con. 91.) If there are distinct granting clauses, each clause should be abstracted according to its order in the deed: (1 Prest. Abs. 75.) If the conveyance is made at the request or by the direction of any particular person, or where a party is stated to have conveyed in any particular character, as heir, executor, trustee, &c., it should be so stated. So where a power is exercised, the reference to the power should be inserted, together with the prescribed mode in which it was to be executed and attested; and it should also be stated in the attestation clause that all the above requisitions were duly complied with: (*ib. id.*)

How the parcels are to be set out.

The parcels should be set out *verbatim* from the first abstracted deed, but in those subsequently abstracted it will be sufficient to refer to them as "All before abstracted premises" (1 Prest. Abs. 81, 83); unless where the description has been varied by more recent assurances, in which case such variation should be noticed: (*ib.* 84.) If there is any exception reserved by the abstracted deed, it should be set out *verbatim* in the same margin, and immediately following the parcels. The general words, such as "Together with all houses," &c., are usually inserted thus shortly; as are also the reversion, the all-estate, and the all-deeds clauses, viz.:—"And the reversion, &c., and all the estate, &c., together with all deeds," &c. But should either of such clauses contain any special matter, it should be fully set out. If there is any exception, that, of course, must be stated in the abstract, and should be fully set out.

General words, reversion clause, all-estate clause, and all-deeds clause.

How the *habendum* of a deed

The latter words of the *habendum* as "To hold," &c., only are inserted; but the words of

limitation following should be fully stated; as "To hold unto the said A. B. and his heirs, to the use of the said A. B., his heirs and assigns, for ever;" or "To hold unto and to the use of the said A. B., his heirs and assigns, for ever;" for whatever words of limitation are here used, they should be copied *verbatim*, and not simply their effect and operation inserted: as to A. B. in fee, to the usual uses to bar dower. The latter terms in fact, even in a recital, are incorrect; because there are many minute forms of uses to bar dower, each varying from the other in some essential particular. As, for example, the mode of executing the power of appointment reserved to the purchaser, which is sometimes directed to be attested by a certain number of witnesses; sometimes to be executed by any deed or instrument in writing; sometimes the power to appoint by will is omitted, and sometimes it is confined to a deed only, but without prescribing any number of witnesses; so that, under such general terms as those above alluded to, it would be impossible for any one to know precisely what the exact uses were. This indeed might in some cases become very important to a title; as where the party conveys by appointment only, and the deed is attested but by one witness, when the power he purposes to exercise directs that there shall be two.

*should be abstracted.*

If, as frequently happens, there are several *habendum* clauses, then each of these, according to the respective order in which it stands in the deed, must be set out in the abstract.

*Where there are several habendum clauses.*

Where there is a *reddendum* clause in the deed, it may generally be given shortly; unless the render is made payable in any particular or unusual manner; but where that occurs, the manner in which it is payable should be stated: (1 Prest. Abs. 101.)

*Reddendum clause.*

It requires considerable skill and judgment to

*Declaration of uses, &c.*

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abstract any special limitations in a proper manner, so as to avoid, on the one hand, overloading the abstract with unnecessary verbosity, and on the other to omit nothing essentially necessary to the elucidation of the title. In the instance of estates tail, for example, the precise words of limitation creating the first estate tail; as also of any estate tail upon the barring of which the title depends, should be fully set out; but the remainders, if created by the usual and proper words of limitation, may be simply stated to be such. In cases where the regular words of limitation have not been used, or an estate only arises by implication, although no doubt exists as to the legal effect and operation, the precise words used should, nevertheless, be copied *verbatim* into the abstract; as should also all provisions for abridging or defeating any estate. So where there is a proviso for redemption in a mortgage deed, the time and place of payment should be stated (if place be mentioned), as also by whom the money is to be paid and the amount of interest reserved. Whether trusts or powers should be abstracted shortly or fully, will, in a great measure, depend upon whether or not such trusts have arisen, or such powers have been, or are intended to be, exercised. If powers have not been exercised, or are barred, released, or extinguished, or have become incapable of taking effect, or are in their nature immaterial to the title, it will be sufficient, in either of those cases, simply to refer to them: (1 Prest. Abs. 151.) Where trusts or powers of sale have been executed, the clauses (provided there be such) exonerating the purchaser from seeing to the application of his purchase-money, or inquiring into the necessity or expediency of the sale, or the performance of any act or condition precedent or concurrent with the sale, should be abstracted rather fully: (*ib. id.*)

Provisoes for cesser of terms, where such occur in the deed, should be abstracted, and where they are considered to have operated, should be more fully stated than is usually done, for, as a learned writer upon this subject justly remarks, "In general, abstracts are too concise in giving this proviso, in those instances in which the proviso is relied on as having caused the cesser of the estate:" (1 Prest. Abs. 143.)

Provisoes for cesser of terms should be fully abstracted.

The common covenants in deeds are usually abstracted shortly, as follows:—Covenants from said (*vendor*) that he was seised in fee; had good right to convey; for quiet enjoyment; free from incumbrances; and for further assurance: (Prest. Abs. 152; 3 *ib.* 56.) If there are any covenants of a special nature, they should be abstracted fully, and the whole terms clearly set out, so that a purchaser cannot possibly be misled by them.

Usual covenants may be abstracted shortly.

It should be stated by what parties the deed is executed, and if any one or more named in the deed have omitted to do so, that fact should be mentioned. Omissions of this kind frequently occur where the dower trustee is described as a party to the conveyance, whose actual concurrence not being essential to pass the whole estate and interest intended to be thereby conveyed, is often unattended to; but however immaterial his concurrence may be, the fact of his non-execution should nevertheless be noticed; for every fact connected with the title should be stated precisely as it occurs. Upon the same principle, therefore, if the instrument be executed in any particular manner, it should appear on the abstract that it has been executed accordingly. For example, where a power has been exercised in pursuance of some specific requisitions imposed by the instrument creating it, the particular mode of execution should be stated, in order to show that the terms of the power have been strictly complied with. So

Execution and attestation clause.

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where any act or thing is required to be done beyond the mere simple act of sealing and delivering the deed of conveyance; as livery of seisin upon a feoffment, or enrolment upon a deed of bargain and sale, or a disentailing deed; or where the acknowledgment of a married woman is necessary to give validity to the conveyance; such of those facts as have taken place should be mentioned. Nor indeed will simply doing this, in all instances, suffice; as in some, at least, the time at which such acts were performed should also be set forth; and if the lands lie in a register county, and the deeds or other assurances have been duly registered, it should be so stated. In the instance of a feoffment, likewise, the manner in which livery was given or received, as by attorney, or with the consent of the tenants, where the lands are on lease, as the case may be, is usually indorsed on the deed; and if this be done it should so appear in the abstract. And in this, and in fact in all cases where a deed is executed by attorney, it will not be sufficient simply to mention that fact, but the power of attorney itself should also be abstracted, though this may be done very briefly.

Memorandum of receipt of purchase-money.

To the attestation there should be annexed a memorandum that the receipt of the consideration-money is indorsed, and if signed and witnessed, as the common practice now is in all modern deeds, those facts should be mentioned: (1 Prest. Abs. 72; *Rountree* v. *Jacob*, 2 Taunt. 141.)

### 6. *Attendant Terms.*

How attendant terms should be abstracted.

Where a term has been assigned to attend the inheritance, the deed or other assurance by which the term was created should be fully abstracted, but the mesne assignments may be abstracted very shortly: (1 Prest. Abs. 25.)

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### 7. *Wills.*

Wills, how to be abstracted.

The date of the will itself, and not the time at which it is proved, should be set opposite to the commencement of the will in the outer margin of the abstract. A will should be abstracted more fully than a deed, and, generally speaking, every charge affecting the premises should be abstracted.

Words of limitation should be abstracted.

The words of limitation creating the estates the devisees take under the will should always be set out, and not simply their effect stated, and this more particularly when untechnical expressions have been employed; and all provisoes of modification should be stated with accuracy.

Where property is devised upon trust to pay debts, purchaser is exonerated from seeing to the application of purchase-moneys.

Where the property is devised upon trust to pay debts and legacies, it will not be absolutely necessary to set out and specify the legacies; because, where real estate is devised for purposes of this kind, the purchaser is not bound to see that the legacies are paid; nor is he, in fact, in any way responsible as to the manner in which his purchase-money may be applied; and the like rule holds also with respect to real property devised to be sold for the payment of debts (*Humble* v. *Bill*, 1 Eq. Ca. Abr. 345; *Smith* v. *Guyon*, 1 Bro. C. C. 186; *Williamson* v. *Curtis*, 3 *ib.* 96; *Barker* v. *Duke of Devonshire*, 3 Mer. 310;) unless such debts are specified and scheduled; but if scheduled, or even specifically mentioned in the will, the purchaser will be responsible for the application of the purchase-money, and must see that it is applied in liquidation of those charges, unless the will contains an express clause exonerating purchasers from all responsibility with respect to the application of such purchase-money: (3 Prest. Abs. 360; *Page* v. *Adams*, Rolls, July 30, 1841, 10 L. J., N. S. 107.)

*Aliter* if the debts are specified or scheduled.

As to lease holds sold by executors.

But the latter rule will not apply to leasehold

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estates sold by executors in that character, they being by law entrusted with a power of converting the personal estate of their testator into money for the purpose of paying his debts, the application of which a purchaser has no right whatever to interfere with; consequently, from actual necessity, and in common justice, he is exonerated from seeing how it is laid out, beyond the liquidation of those charges upon the property which are independent of the will, as mortgages, or other charges thereon, anterior to such will: (Butl. note to 1 Inst. 290; 3 Prest. Abs. 259, 260.)

How the fact of probate should be abstracted.

The fact of probate should be set out at the foot of the will, stating the court in which it was proved, and by whom; as also the day of the month and year in which such probate was obtained. If the will is registered in consequence of the devised lands lying within a register county, the fact of registration should be stated: (1 Prest. Abs. 182, 185.)

### 8. *Fines and Recoveries.*

How fines and recoveries are to be set out in the abstract.

In the case of fines and recoveries, the practice is to set out in the outer margin the term and reign of the king or queen for the time being in which they were levied or suffered, and not the day of the month and year in which those assurances were made: as "Hilary Term, 40 Geo. 3." In the case of a fine, the abstract should specify what particular species of fine it was; as *sur cognizance de droit come ceo, &c. sur concesset, &c.;* and should also contain the names of the parties, viz., the conuzor, conuzees, as also the parcels as set out in the fine, with their local situation. In the exemplification of a recovery, the names of the demandant, tenant and vouchees, and the course and order in which the parties were respectively vouched; as also all the par-

cels, with their local descriptions as well as the time at which the writ of seisin was returnable, and seisin delivered, should be all inserted.

### 9. *Commission or Fiat in Bankruptcy.*

How commission or fiat in bankruptcy should be abstracted.

In the case of a commission or fiat in bankruptcy prior to the statute of the 1 & 2 Will. 4, c. 56, it is requisite to abstract the commission, commencing with the date, which should be inserted in the usual manner in the outer margin, then stating the commission or fiat, and the names of the commissioners, with the clause of *quorum*, in order that it may be seen whether the commissioners have duly exercised their authority, and, of course, the deed of bargain and sale of the commissioners: (1 Prest. Abs. 167.) But the property of bankrupts, since the passing of the act above alluded to, vests in the assignees, without any other conveyance. When, therefore, the bankruptcy is subsequent to the above-mentioned statute, the recital of the trading and act of bankruptcy, as also the appointment of the assignees, should be set out rather fully; unless the bankrupt has himself concurred in the conveyance, for, in that case, he would be estopped from disputing either of the above facts.

### 10. *Insolvency.*

How proceedings in cases of insolvency are to be abstracted.

Where the title is traced through an insolvent, if the proceedings be prior to the statute 1 & 2 Vict. c. 110, the time of presenting and filing of the petition by the insolvent, the conveyance and assignment to the provisional assignee, and the conveyance and assignment by such provisional assignee to the creditor's assignee, must be set out in the abstract; and these assurances, which are filed of record in the court, must be authenticated by a copy of such record made upon

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parchment under the seal of such court: (Stat. 7 Geo. 4, c. 57, ss. 11, 19.) If the proceedings are subsequent to the above-mentioned statute of the 1 & 2 Vict. c. 110, then the order made under such last-mentioned act duly entered of record upon the petition of the insolvent, or upon the petition of an execution creditor, vesting the estate and effects of the insolvent in the provisional assignee, and likewise the order appointing the creditor's assignee, must be set out in the abstract, and must be verified by such certified copy written out upon parchment under the seal of the court (ss. 42, 45, 46.) And where any conveyance of an insolvent would require to be registered, in that case, as the certified copy should be registered in the same manner as an ordinary conveyance, the fact of registration should be mentioned in the abstract.

As to proceedings under statute 8 & 9 Vict. c. 116.

If the proceedings are under the act 5 & 6 Vict. c. 116, which authorizes the Court of Bankruptcy to administer relief to insolvent debtors at large, the abstract should set out the insolvent's petition for protection from process, the nomination by the commissioner of the official assignee, and then the final order made by the commissioner for the protection of the person of the insolvent from all process, and for the vesting of his estate and effects in the official and creditors' assignee. And as this act requires a meeting of the creditors to be called before the assignee can sell the real estate, the fact of the meeting having heen held, and the resolution of the creditors approving and directing the sale, should perhaps properly appear on the abstract: (*Sidebotham* v. *Barrington*, 4 Beav. 110; *Wright* v. *Maunder*, *ib.* 512.)

### 11. *Acts of Parliament.*

Acts of Parliament.

Where there is any private act of Parliament

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relating to the title, the usual practice is to abstract it very shortly, because a printed form of the act itself is always forwarded with the abstract.

### 12. *Judgments.*

Judgments should be set out in abstract.

It was not formerly usual to abstract judgments, the practice being for the purchaser to search for them, except in those cases where such search was rendered unnecessary by the equitable protection afforded by an attendant term, or the like. Lord Kenyon, however, in *Richards* v. *Barton*, 1 Esp. N. P. C. 217, said that an abstract ought to mention every incumbrance whatever affecting an estate upon which any security was about to be placed, and should therefore contain an account of every judgment by which the estate was affected. This opinion was not however adopted by the profession so long as judgments were mere general liens on the land. But as, since the statute of the 1 & 2 Vict. c. 110, judgments are made an actual charge upon the lands, the vendor's solicitor ought to abstract them in like manner as any other charge upon the property.

### 13. *Decrees.*

Decrees and decretal orders.

Decrees or decretal orders, where they in any way affect the property, should be abstracted. And wherever there has been a reference to the Master upon any point relating to the title, his report, together with the order or decree thereupon, should be stated.

### 14. *Descents.*

Descents should be proved by authenticated pedigree.

Descents should be proved by an authenticated pedigree, containing the names of the parties, and the days of their births, marriages, and deaths,

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as also of the respective ages at which they each respectively died, all of which should be copied out *verbatim*. To this should be added extracts from ancient leases, or land-tax assessments, or such other evidence of ownership as can be produced to show the manner in which, and by whom, the property has been enjoyed.

### 15. *Administration.*

It should be stated whether general or limited administration has been granted.

Where letters of administration have been granted, it should be mentioned whether they were general or special, the name of the court out of which they were obtained, and to whom granted. The date also should be set out in the usual way in the outer margin.

### 16. *Matters of Fact.*

Matters of fact should be set out in the order in which they occur.

Matters of fact, such as births, marriages, and deaths, should be inserted in the order in which they occur; and, if authenticated by certificates, the latter with the dates of the events therein certified should be set out. In the case of intestacy, letters of administration are the most satisfactory evidence of that fact, and if they have been obtained, they should be abstracted for that purpose.

### 17. *Cancellation, Alteration, or Erasure of Documents.*

Cancellation, alteration, or erasure of documents should be stated in the abstract.

No fact or circumstance whatever connected with the title should be omitted, simply because such fact or circumstance may be insufficient to invalidate it. Take, for example, the case of the cancellation of a material deed, which, as the law now stands, will not annul it, or restore the estate to the former proprietor : (*Magennis* v. *McCullough*, Gilb. Eq. Cas. 235; *Bolton* v. *Carlisle*

(*Bishop of*), 2 Hen. Blackst. 264; *Perrott* v. *Perrott*, 14 East, 423; see also *Roe* v. *York* (*Archbishop of*), 6 East, 86; *Doe dem. Courtail* v. *Thomas*, 9 B. & C. 288.) Still a fact of that kind ought not to be passed by unnoticed in the abstract. If an erasure or interlineation has been made subsequent to the execution of the instrument, that fact should be disclosed, together with the manner and circumstances under which it was done; and the more particularly so, as a fraudulent alteration by either of those means, if made by the person himself taking under it, would vitiate his interest altogether. It was, indeed, formerly considered that an alteration, by erasure or interlineation, would avoid the whole instrument, even if made by a mere stranger. But the law is otherwise now, and any alteration made by a stranger will not prevent the contents of a deed or other instrument from retaining its original effect and operation, if it can be clearly shown what that effect and operation was. To accomplish this, the mutilated instrument may be given in evidence as far as its contents appear; and extrinsic evidence will be admitted to show what parts have been erased or altered, as also of the words contained in such altered or erased parts; but if, for want of this evidence, or any uncertainty arising out of it, the original contents of the deed cannot be ascertained, then the old rule would become applicable, or, more properly speaking, the deed would become void for uncertainty. In cases of this or a like kind, every fact and circumstance, as I have before stated, connected with such alteration or erasure, should be fully revealed by the abstract: (see 1 Prest. Abs. 156, 157.)

18. *Statement at the End of the Abstract.*

It will be the proper, though not the general practice, to state at the end or foot of the abstract

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whether the vendor be married or single; and, if married, whether his marriage took place prior to the year 1834, in order to ascertain whether her right of dower has attached upon the property; or in case her right of dower has been barred by any settlement or other instrument, then an abstract of such settlement or instrument should be furnished, in order to show that it has effected the object intended. The abstract should likewise be accompanied by a statement of all matters relative to the legal characters and situations of every party interested in the property which do not appear on the face of the abstract, in order that counsel may be enabled to advise with precision on everything connected with the title, and point out the mode of assurance to the purchaser without the necessity of calling for further information: (see 1 Bart. Prec. xxxvii.)

## SECTION III.

### ABSTRACTS OF LEASEHOLD PROPERTY.

Purchaser of leaseholds entitled to clear sixty years' title.

A PURCHASER of leasehold property, whether for lives or years, is entitled to a clear sixty years' title, in like manner as a purchaser of a freehold estate; and unless, as we have already seen, there is some express stipulation to the contrary, the vendor cannot call upon the vendee for a specific performance without also producing and showing an unimpeachable title in the lessor.

Lessor's title should be set out in abstracts of leaseholds.

An abstract of leasehold property should therefore first set out the lessor's title. The original lease should then be abstracted, as should also all the *mesne* assignments. In abstracting the lease the amount of rent and all outgoings should be abstracted, and all covenants which are of a special or a burdensome nature should be set out very fully, but common and usual covenants may be set out briefly.

Executors' consent requisite to confer a title to a legatee of a term.

Where the leaseholds are for years, and these have recently been specifically bequeathed, and the legatee is the vendor, who is to assign without the concurrence of the executors, proof of their assent will be requisite, for without such assent, the executors, on a deficiency of assets, might avoid the bequest and assign the term to a third party, and thus defeat the vendor's title. The best course for the vendor would be to get the executor to assent to the contract, which would be a binding assent upon him. It will, of course, be necessary to abstract the will under

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which the legatee claims, and it must also be stated in what ecclesiastical court such will was proved, in order to show that the court had competent jurisdiction. The same observations are also applicable to the grant of letters of administration.

Stipulation that purchaser shall not require lessor's title will not preclude purchaser from rescinding contract if he can show lessor's title to be a bad one.

It is very common now, in sales of leasehold property, to stipulate that the vendor shall not be required to produce his lessor's title, or where it is produced, that the title shall be carried back beyond a certain period; but this will not preclude the vendee from the right of rescinding the contract in either instance, if he can show that the lessor's title is a bad one.

Matters of fact should be set out in abstract.

An abstract of leasehold property should also contain evidence of deaths, marriages, intestacies, and other matters of fact and circumstances, as the abstract of title to a freehold estate.

## SECTION IV.

### ABSTRACTS OF COPYHOLDS.

In all abstracts the copies of court roll, which form the title of a copyholder, must be set out in the abstract, and the copies of court roll themselves should also be furnished to the purchaser, in order to give him an opportunity of comparing them with the abstract.

Copies of court roll must be set out in abstract.

All deeds, declaring the uses of the copyholds, must also be abstracted, and also the dates of the surrenders and admittances, and by whom and to whom made; such being in substance the mode by which property of this nature is conveyed from one party to another.

Deeds declaring uses &c., must be abstracted.

Any particular manorial customs that may affect the property should also be mentioned, as also the admittance of the customary heir as such; and where any estate tail has been barred, the mode in which it has been done should be stated, in order that it may be seen that the customary requisites and formalities have been complied with; and agreements and other transactions that can in any way affect the equitable title should also be shown: (1 Prest. Abs. 204.)

Particular manorial customs should be mentioned.

In case the property has been devised by will, it should be stated whether there was any previous surrender to the use of a will. Such surrender is not requisite to give validity to a will

Where copyholds have been devised, it should be stated whether

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there has been any previous surrender to the use of the will.

of copyhold estates made subsequently to the year 1815: (stat. 55 Geo. 3, c. 192.) It must, however, be observed that the statute dispensing with surrenders to will is only prospective in its operation.

# CHAPTER IV.

## OF THE INVESTIGATION OF THE TITLE.

I. PRACTICAL SUGGESTIONS ON THE PERUSAL OF AN ABSTRACT.

1. *Preliminary Remarks.*
2. *Abstract should be submitted to Counsel.*
3. *Objects to be kept in view in perusing an Abstract.*
4. *Distinction between Matters of Conveyance and Questions of Title.*
5. *How to analyze an Abstract.*
6. *What Matters or Circumstances will render further Inquiry requisite.*
7. *How Requisitions are usually inserted.*

II. LEGAL OPERATION AND EFFECT OF THE VARIOUS DOCUMENTS SET OUT IN THE ABSTRACT.

1. *It must be ascertained in whom the Legal Estate is vested.*
2. *Of Uses and Trusts.*
3. *Legal Construction of the several Documents set out in the Abstract.*

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## I. PRACTICAL SUGGESTIONS ON THE PERUSAL OF AN ABSTRACT.

### 1. *Preliminary Remarks.*

THE principal duty of the purchaser's solicitor is to ascertain whether the vendor can confer a good title, and if so, then to take care that the property is properly conveyed to his client. In

Purchaser's solicitor must ascertain if vendor can confer a good title.

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investigating a title, the usual course is, for the purchaser's solicitor to ascertain whether a good and marketable title appears on the face of the abstract. If satisfied in this respect, he must next compare the abstract with the documents therein set forth, in order to discover how far they correspond ; and being satisfied also upon this most essential point, he must then see that the documents themselves are legally executed by the proper parties, and duly attested. Where there is a pecuniary consideration, he should also see that the receipt is duly indorsed and signed. If enrolment was essential, he should see that this has been done accordingly ; and what is frequently never thought of, or, at any rate, very frequently overlooked, he should ascertain that all the deeds bear the proper stamps.

### 2. *Abstract should be submitted to Counsel.*

Abstract should always be submitted to counsel.

If the title is in the least degree complicated, the abstract should always be submitted to counsel for perusal. Strictly speaking, indeed, it is the duty of a purchaser's solicitor to submit the abstract to counsel in every instance, and by omitting to do so, he renders himself personally responsible for any loss or prejudice his client may sustain in consequence of his accepting a bad, incumbered or unmarketable title : (*Brooks* v. *Day*, 2 Dick. 572 ; *Forshall* v. *Coles*, 7 Vin. Abr. 54, pl. 6 ; *Green* v. *Jackson*, Peake N. P. C. 236 ; *Ireson* v. *Pearman*, 5 Dow. & Ry. 687 ; *Thwaites* v. *Mackerson*, 3 Carr. & Pay. 341 ; *Wilson* v. *Tucker*, 3 Stark. 104 ; *Temple* v. *Brown*, 6 Taunt. 60, 63 ; *Williams* v. *Jay*, 11 L. T. 85.) But this personal liability may often prove an inadequate recompense for the consequences of an act of negligence of this kind. Many solicitors, however willing, may be wholly unable to compensate a client who, on account

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of having bought property with a defective title, is either evicted from it outright, or compelled to hold it saddled with heavy incumbrances; added to which, all remedy against a solicitor for a default of this kind will be barred by the Statute of Limitations (stat. 21 Jac. 1, c. 16), six years after the commission of the act or default, without any reference to the time the actual damage accrued (*Short* v. *M'Carthy*, 3 B. & A. 626; *Howell* v. *Young*, 5 B. & C. 259; 2 Carr. & Pay. 238); consequently, if such damage did not accrue within the six years, the remedy against the solicitor would be altogether barred. And even where compensation could be obtained, from what I have seen in matters of a like kind, I do not believe that one wronged client out of twenty would attempt to enforce it. As a moral point of duty, therefore, if the slightest doubt arises upon the validity of a title, no solicitor should rely simply upon his own opinion, or take upon himself the responsibility of accepting it without having had it investigated by counsel.

Copy of conditions should accompany abstract.

A copy of the conditions of sale, where the property has been sold by auction, or of the agreement where the sale has been entered into by private contract, should always accompany the abstract, in order that counsel may discover whether it contains any special stipulations or agreements debarring a purchaser from calling for such a title or evidence of title, as a purchaser under ordinary circumstances would be entitled to require or call for.

### 3. *Objects to be kept in view in perusing an Abstract.*

To what points the purchaser's solicitor should direct his attention.

The principal objects to be kept in view in perusing an abstract, are,—1. To see that the title is carried back sufficiently far. 2. To discover the legal operation and effect of the various

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instruments, and the capacity of the various parties. 3. That there is a clear deduction both of the legal and equitable estate. 4. That all particular estates are either determined or can be conveyed to the purchaser, and that there are no incumbrances; or if there are, that they are of such a nature as can be gotten rid of, so that a clear and unburdened estate may pass to the purchaser. 5. It must appear beyond all doubt that the parcels comprised in any deed then under investigation are the same that are comprised in the former deeds (3 Prest. Abs. 33); and if the identity does not sufficiently appear from the abstract, it must be authenticated by extraneous evidence. This can usually be effected through the medium of land-tax or poor-rate assessments, when, if it should appear that such assessments have been made without any variation, except in the change of the owner's name, it may reasonably be presumed that all is right: (*ib. id.*)

### 4. *Distinction between Matters of Conveyance and Questions of Title.*

Matters of conveyance and questions of title.

Another object which must never be lost sight of during the course of investigation, is the distinction between questions merely of conveyance and questions of title; that is to say, if the estate is outstanding in a trustee or any one who is under a legal obligation to make such a conveyance as the vendor shall direct, then it is a question of conveyance merely; but if the estate be outstanding in a party, as an annuitant for instance, who is under no legal or moral obligation to convey it, it is a question of title (*Elliott* v. *Merryman*, Barnardist. 82; *Wynn* v. *Williams*, 5 Ves. 130; *Page* v. *Adam*, 9 L. J. 407); in the latter instance the title is bad; in the former it is good; for the vendor being able to obtain the concurrence of all necessary parties, is thus

enabled to convey an absolute estate to the purchaser.

### 5. *How to analyze an Abstract.*

Analysis will tend to assist the investigation.

It will generally be advisable for the peruser to make an analysis of the abstract, which will be found to accelerate as well as simplify the labour of investigation. This course will be particularly advantageous where different parcels of land are derived through various channels, and the several documents relating to each are blended together in the abstract according to their respective dates, when considerable confusion may arise, unless each portion is, as it ought to be, arranged under a distinct head, and treated altogether as if it was a distinct title, until the various portions unite in one person; and the like observations are also applicable to cases where there have been several mortgages of the same lands to different mortgagees, when the title of each mortgagee, as also the title of the equity of redemption, should be distinctly considered. An investigation of this kind will be greatly accelerated by making a short analysis, an excellent form of which is furnished by Mr. Preston, in the appendix to his valuable work on abstracts of title.

How to make an analysis of an abstract.

In an ordinary case, an abstract of an estate of inheritance may be analyzed in the following simple manner:—1796, 3rd and 4th of June. Indres. of le. and rele.—Rele. A. B. conveyed to C. D. in fee; 1800, Oct. 7, C. D. devises to E. F. in fee; 1801, Nov. 10, testator died; 1802, Jan. 17, will proved in Prerogative Court of Canterbury; 1803, 1st and 2nd of March, E. F. conveys to J. H. in fee to uses to bar dower; 1805, 12th of May, J. H. mortgages to J. L. by appointment; and thus continue to set out the

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various instruments according to their respective dates and order.

### 6. *What Matters or Circumstances will render further Inquiry requisite.*

Inquiries to be made when important documents are omitted.

After making an analysis of the abstract, the attention should be particularly directed to see whether every document necessary to the elucidation of the title is there set forth ; and if it should appear that any are omitted, or merely mentioned in the recitals, or simply referred to, they should be called for and their production insisted upon. This frequently occurs where persons seised in fee have made wills, but have made no disposition of the abstracted property ; then the will ought to be produced, as affording the best and most conclusive and satisfactory evidence of that fact. The common practice of conveyancers, however, is to rest satisfied with the production of the probate copy, and not to require the original will : (Cov. Ev. 1.) Inquiry should also be made as to whether any owners of the property executed a marriage settlement, and, if so, its production should be required, in order to ascertain that the property is not affected by it, and nothing should be taken for granted where proper evidence of the fact can be produced. Hence the peruser of an abstract should never rest satisfied with the bare statement of the fact of, "fine levied," or "recovery suffered accordingly ;" but should call for the production of the chirograph of the fine, or exemplification of the recovery.

Every stated fact should be proved by the proper evidence.

Every stated fact should be supported by the proper evidence. To prove intestacy, therefore, letters of administration to the effects of the intestate should be produced ; to prove the appointment of executors, an office extract from the will

by which they were so appointed; to prove a pedigree, certificates of births, baptisms, marriages, deaths and burials; and to prove the payment of an annuity, or other annual charge, the last receipt from the party entitled, acknowledging the payment.

Office copies from awards under Inclosure Acts, and an attested and examined copy of an act of Parliament, not made a public one, or a printed copy of it made evidence, should be called for, when such documents in any way relate to the abstracted premises.

Office copies under inclosure acts.

Where any important fact is not stated in the abstract; as, for example, the enrolment of a deed of bargain and sale, or disentailing deed; livery of seisin in the case of a feoffment; the acknowledgment of a married woman; the registration of a deed in a register county; or that the terms of a power, as where a deed is required to be attested by two witnesses, have been duly complied with,—it should be asked whether these things have been done.

Where any important fact is not mentioned inquiry becomes necessary

Another subject, demanding a strict inquiry, is when any unaccountable circumstance appears on the abstract; as where any act is done without an apparent reason, which is a matter always sufficient to excite suspicion; as, for instance, where a feoffment is made, or a fine levied, or a recovery has been suffered, and there does not appear to have been any ostensible cause for those assurances having been made and entered into. So where any unusual occurrence takes place, as when a deed is delivered as an escrow, it should be fully ascertained that every condition has been performed, and that the second delivery has taken place.

When any unaccountable act has been done, inquiry becomes necessary.

### 7. *How Requisitions are usually inserted.*

Requisitions like those I have just alluded to are generally inserted in the margin, where they

Requisitions of title how usually inserted.

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readily attract the attention ; the more important points being set out at the end of the abstract. Before, however, any marginal remarks are made, the abstract should be gone through and analyzed, otherwise the margins may be, as I have often seen them, incumbered with a host of requisitions, which, on a further perusal, it will be seen have been already complied with.

## SECTION II.

LEGAL OPERATION AND EFFECT OF THE VARIOUS DOCUMENTS SET OUT IN THE ABSTRACT.

1. *It must be ascertained in whom the Legal Estate is vested.*
2. *Of Uses and Trusts.*
3. *Legal Construction of the several Documents set out in the Abstract.*

### 1. *It must be ascertained in whom the Legal Estate is vested.*

The vesting of the legal estate.

ANOTHER important point in investigating a title is to ascertain in whom the legal estate is vested. This will depend, not only upon the terms by which the property is limited, but also upon the kind of instrument by which it is conveyed; for the same words, when contained in an ordinary conveyance by release or in a will, would receive a different construction when found in an indenture of bargain and sale, or in a deed of appointment executing a power. Previously, however, to pointing out the operation of the various instruments, it will be advisable first of all to attempt a brief outline of the doctrine of uses as they stood originally at common law, in order to show more clearly the alteration effected by the Statute of Uses (27 Hen. 8, c. 10), by which they were executed into possession.

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## 2. *Of Uses and Trusts.*

A common law use was a trust or confidence reposed in another who was tenant of the land, that he should dispose of the same according to the intentions of *cestui que use*, or him to whose use it was granted. This use did not arise out of the land as a rent, condition, or right of common, but was a thing collateral annexed in privity to the estate, and to the person concerning the land, that the *cestui que use* should take the profits, and that the *terre tenant*, or feoffee to uses, should make estates according to his directions, and plead such pleas as he should supply him with at the costs of the *cestui que use;* so that the feoffee had the seisin or sole property, whilst the *cestui que use* had neither the *jus in re*, nor the *jus ad rem*—neither a right in possession, or in action, but only a confidence and trust, of which the common law took no notice, but for which relief might have been obtained by *subpœna* in Chancery: (Shep. Touch. 502; *Chudleigh's case*, 1 Rep. 121; Co. Litt. 271, *b*; *Delamere's case*, Plow. 346; *Brent's case*, 2 Leon. 14; Tr. Eq. lib. 2, ch. 1, s. 2; *Jones* v. *Morley*, 1 Lord Raym. 291; Gilb. Uses, 16; 2 Roll. Abr. 780.)

When uses were first instituted.

Uses, it appears, were first instituted in this kingdom about the close of the reign of Edward 3 (Bac. Uses, 8; 2 Black. Com. 328), by means of foreign ecclesiastics, who introduced them for the purpose of evading the statutes of mortmain; which, as Sir William Blackstone observes (vol. 2, p. 329), though introduced fraudulently, afterwards continued to be used innocently, and were sometimes very laudably applied to a number of civil purposes; particularly as they removed the restraint of alienation by will, and permitted the owner of lands in his lifetime to make various

dispositions of their profits, as prudence, or justice, or family convenience might from time to time require. At length, during our long war in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal, through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures—when each of the contending parties, as they became uppermost, alternately attainted the other. But, on the other hand, uses were considered in many instances as opening a door to fraud and injustice; and Lord Bacon complains (Use of the Law, 153) that this course of proceeding was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt, and the poor tenant of his lease. To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use* (50 Edw. 3, c. 6; 2 Rich. 2, Sess. 2, 3; 19 Hen. 7, c. 15); allowing actions for the freehold to be brought against him if in the actual enjoyment of the property (stat. 1 Rich. 2, c. 9; 4 Hen. 4, s. 7, c. 15; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1); made him liable to actions of waste (11 Hen. 6, c. 5); established his conveyances and leases made without the concurrence of the feoffees (1 Rich. 3, c. 1); and gave the lord the wardship of his heir, with certain other feudal perquisites (4 Hen. 7, c. 17; 19 Hen. 7, c. 15.) The provisions just alluded to all tended to consider the *cestui que use* as the real owner of the estate, and at length that idea was carried into full effect by the sta-

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tute 27 Hen. 8, c. 10, usually called the Statute of Uses, which, after reciting the various inconveniences before mentioned, and some others, enacts, that "when any person shall be seised of lands, &c. to the use, confidence, or trust of any other person, or body politic, the person or corporation entitled to the use in fee simple, fee tail, or for life, or years, or otherwise, shall from thenceforth stand and be possessed of the lands, &c. of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to use shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." The statute thus executes the use, or, in other words, conveys the actual possession to the use, and by that means, in technical language, transfers the use into possession, thereby making *Cestui que use* complete owner of the lands, as well at law as in equity: (2 Blac. Com. 332, 333; Shep. Touch. 504; *Lutwich* v. *Mitton*, Cro. Jac. 604; *Iseham* v. *Morrice*, Cro. Car. 110; *Saffyn's case*, 5 Rep. 124; *Barker* v. *Keat*, 2 Mod. 252.)

Operation and effect of the Statute of Uses.

The object of the statute of 27 Hen. 8, c. 10, undoubtedly was to annihilate uses altogether; but so far from attaining this end, it became the means of introducing a new mode of conveyancing admirably adapted to the exigencies of mankind. Hence the judges began very soon to depart from the rigour and simplicity of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon other assurances. Thus, says Blackstone (vol. 2, p. 334), it was adjudged that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, and in the meanwhile the ancient use

shall remain in the original grantor. As where lands are conveyed to the use of A. and B. after a marriage shall be had between them (1 Roll. Abr. 797), which doctrine, when devises were again introduced, and considered equivalent in point of construction to a declaration of uses, was also adopted in favour of executory devises. But these springing uses differed from executory devises, because, in the former instance, there must be a person seised to such use at the time the contingency happened, otherwise the statute could not have executed them; and the destruction of the estate of the feoffee before the happening of the contingency, would, as we have already seen, have destroyed the use for ever; whereas, by an executory devise, the future freehold is transferred to the future devisee. And now, as I had shortly before occasion to remark, the recent statute of the 8 & 9 Vict. c. 106, has for the future abolished the distinction between springing uses and executory devises, so far as the destruction of the former is concerned by failure of the preceding particular estate, by enacting that a contingent remainder shall not, after the 31st of December, 1844, fail of effect on account of the premature determination of the preceding estate: (sect. 8.)

What persons may be seised to a use.

Neither the king nor the queen (whether consort or regnant) could have been seised to a use, on account of their royal dignity (Bac. Uses, 56, 57; 2 Blac. Com. 331); nor could a corporate body have been seised to any use but their own: (Bac. Uses, 337; Plow. 102.) But all other persons capable of taking lands by feoffment might have been feoffees to uses, and may be so still. Hence a *feme covert*, or an infant, may be a feoffee to uses (Bac. Uses, 58), as may also a tenant in tail (*Seymour's case*, Plow. 557;

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10 Rep. 95), or for life (*Crawley's case*, Cro. Car. 567); but then the use to arise out of these limited estates will determine with them, because a *cestui que use* cannot have an estate of greater extent than that out of which it is raised: (Dy. 186; And. 130; Cro. Car. 231.)

What description of property may be limited to uses.

Nothing can be limited to a use whereof the use is inseparable from the possession; consequently, the statute does not extend to copyhold estates, the seisin of which is in the lord of the manor; and therefore the uses declared of a surrender of copyhold are mere equitable trusts: (1 Wat. Cop. 100; Gilb. Ten. 170; *Rowden* v. *Master*, Cro. Car. 44; *Doe* v. *Routlege*, Cow. 709.) And as the statute only mentions such persons as are seised to the use of others, it will not include terms of years or other chattel interests, whereof the termor is not seised, but only possessed: (Bac. Uses, 335; Jenk. 444; 2 Blac. Com. 336; Poph. 76; Dy. 396.) Therefore if a term of 1,000 years be limited to A., to the use of, or in trust for B., the statute executes the use in A., and not in B., the latter of whom takes only an equitable estate. But a term of years may, nevertheless, be created in the first instance by way of use out of an estate of freehold, as there is then a seisin to support it (Co. Litt. 271, *b;* 1 Pres. Abs. 140; Gilb. on Uses, 67, n. 2); such, in fact, being the ordinary mode by which the possession is executed in the bargainee for the year to uses, as a foundation for a release under the usual conveyance by lease and release. It appears also that incorporeal hereditaments, such as advowsons and tithes, are within the operation of the statute (1 Sand. Uses, 107; 1 Cru. Dig. tit. ii. c. 3, s. 20); as also liberties and franchises visible or local, and commons and ways, *when appendant*, but not, it seems, when in gross: (Sand. Uses, 107; *Beaudley* v. *Brooke*,

Cro. Jac. 189.) It appears, also, that rents, *in esse*, and, it seems, a rent-charge *de novo*, are within the statute (Bac. Uses, 43); but annuities, or other personal inheritances of which no seisin can be given (Cro. Eliz. 401), are not.

To what persons the use may be limited.

All persons capable of taking by conveyance may take by way of use; and by the words of the statute, corporations, though incapable of being seised to, are yet capable of taking by way of use. According to Bacon, also, a use may be limited to the king: but in such case both the declarations of the use and the conveyance itself must be by matter of record, because the king's title is compounded of both: (Bac. Uses, 60.)

How the use is executed into possession.

The Statute of Uses transfers the estate to the use in the same manner as if the feoffees or trustees to uses after the conveyance to them had actually conveyed their estate to each respective *cestui que use*, thus passing to them a legal instead of an equitable estate (1 Atk. 592; Bac. Uses, 45), such uses, in fact, taking effect out of the seisin of the feoffees or trustees immediately on the execution of the conveyance, they being considered a mere conduit-pipe to the uses: (1 Rep. 120.) Thus, under a limitation to A. and his heirs, to the use of B. and his heirs, the seisin is conveyed to A. the trustee, and out of his seisin the use is limited to B., and the instant the deed is executed, A.'s seisin is divested, and B. takes the legal estate under the statute, without entry or any other act: (*Green* v. *Wiseman*, 10 Vin. 213.) Nor is it actually necessary that the terms "*to the use*" should be employed; for a limitation to A. "*in trust*," or "*in confidence*," for B., will have the same effect: (*Eure* v. *Howard*, Pre. Cha. 345; *Broughton* v. *Langley*, 2 Salk. 679; Fonbl. Eq. 143, n. *e.*; Sand. Uses, 124, 125; *Doe dem. Terry* v. *Collier*, 11 East, 377.) And a use may be limited by a will, as well as by a deed: (Sand. Uses, 195; *Popham* v.

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*Bamfield*, 1 Vern. 167; *Hopkins* v. *Hopkins*, 1 Atk. 589; *Wright* v. *Pearson*, 1 Ed. 119; *Perry* v. *Phillips*, 1 Ves. 255; *Thompson* v. *Lawley*, 2 Bos. & Pull. 311; *Carr* v. *Erroll* (*Earl of*), 6 East, 58.)

Persons may take under the Statute of Uses who could not have taken at common law.

At common law, a grantee to take an immediate estate must have been named in the granting part, for if named only in the *habendum*, he could not have taken, so that it could not have been limited to a person unborn to take the first estate; but now, under limitations to uses, such persons may take the first estate, the uses to support it in the meantime resulting to the grantor: (13 Rep. 55; 2 Prest. Convey. 475.) Neither at common law could a man have conveyed to his wife, on account of the unity of person; but under the statute a limitation to another to the use of his wife is good: (Co. Litt. 3, *a.*; 114, *a.*; 2 Vern. 385; 2 Atk. 271, *a.*; Co. Litt. 112, *a.*; 1 Sand. Uses, 130; 1 Prest. Convey. 476.)

Fee may be limited to take effect after a fee under conveyances to uses.

Under conveyances to uses also, a fee may be limited to take effect after a fee (*Carpenter* v. *Smith*, Pollexf. 78; *Marks* v. *Marks*, 10 Mod. 423); because, though that was forbidden at the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity; and then the use executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto*; as where A. makes a conveyance to the use of his intended wife and her eldest son for their lives. Upon the marriage the wife takes the whole use in severalty, and upon the birth of a son the use is executed in them both jointly: (Show. P. C. 137; Bac. Uses, 131.) So also, in the instance of a proviso frequently inserted in marriage settlements and

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wills, that in case the person who is to take under the limitations shall become entitled to the family estate, the estate settled on him shall cease and go over to some other person: (*Nicholls* v. *Sheffield*, 2 Bro. C. C. 215; *Carr* v. *Erroll* (*Earl of*), 6 East, 58; *Stanley* v. *Stanley*, 16 *ib.* 491; *Doe* v. *Heneage*, 4 T. R. 13.)

Of shifting uses.

Limitations of this kind are sometimes called secondary, sometimes shifting uses, and being to take effect upon the occurrence of events that may not happen, are properly classed under the head of conditional limitations. And when the use thus limited expires, or cannot vest, it returns back to him who raised it, and is then styled a resulting use. As for example, suppose a man executes a marriage settlement, limiting the lands to the use of his intended wife for life, with remainder to the use of his first-born son in tail. In this case, until he marries, the use results back to himself; after the marriage, it is executed in the wife for life, and if she dies without issue, the whole results back to him in fee: (1 Rep. 120.)

Of resulting uses.

So also where a person seised in fee-simple made a feoffment, levied a fine, or suffered a recovery without any consideration, or declaration of uses, the use would have resulted back, and he would have been seised in fee-simple in the same manner as before. If any particular uses are declared, so much of the old use as is not declared to be vested in some other person results back to the original owner: (*Clere's case*, 6 Rep. 176; *Woodliffe* v. *Drury*, Cro. Eliz. 439; *Beckwith's case*, 2 Rep. 58; *Godbold* v. *Freestone*, 3 Lev. 406; *Penhay* v. *Hurrell*, 2 Vern. 370; *Wills* v. *Palmer*, 2 W. Black. 687; *Armstrong* v. *Wolsey*, 2 Wils. 19.) And where a tenant in tail suffers a recovery of his estate, by which it is converted into a fee-simple, without

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consideration or declaration of the use, it seems it will result to the tenant in tail in fee: (9 Rep. 8, *b.*; Gilb. Uses, 61; *Derwentwater's* (*Lord*) *case*, cited 1 Atk. 9; *Nightingale* v. *Ferrers*, 3 P. Wms. 206; *Stapilton* v. *Stapilton*, 1 Atk. 2, 9; *Doe dem. Crow* v. *Baldwere*, 5 T. R. 110.) But where there is any consideration expressed, though purely nominal, and no use is declared, it will not result; for what draws the use out of the feoffor or grantor is either the consideration or the expressing it to be to the use of another: (*Shortridge* v. *Lamplugh*, 2 Ld. Raym. 798; 7 Mod. 71; 2 Salk. 678; *Lloyd* v. *Spillett*, 2 Atk. 148; Barnardist. 384.) Yet where there is a consideration, and part only of the uses are declared, the residue will result to the feoffor or grantor: (2 Fonb. Eq. 134, n. *m.*)

Distinction between a feoffment to uses and a covenant to stand seised.

In the case of a covenant to stand seised, the late Mr. Fonblanque, in a note to his valuable Treatise of Equity (vol. 2, p. 134, 135, note *n*), remarks, that "one difference between a feoffment to uses and a covenant to stand seised, is, that in a covenant to stand seised to uses not only so much as the covenantor does not dispose of remains in him, but also such uses as do not and cannot take effect; and if A. covenant, in consideration of blood, to stand seised to the use of B., his son, for life, and in consideration of 1,000*l.* to stand seised to the use of C. in fee, after the death of B., and B. refuse the use, A. shall retain, and C. shall not take immediately; whereas, if A. had made a feoffment to the use of B. for life, and afterwards to the use of C. for life, and B. refused, in that case C. should take his estate presently; the reason of which distinction is, that in the latter case the feoffor by his feoffment hath put his whole estate out of him, and all the uses are created out of it, as out of one and the same root; and therefore, so long

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as any of the uses can take effect, the feoffor shall not meddle with the land; but in the former case, a covenant raising a use, there the consideration, which is the cause which raises every several use, is several, and all the uses grow and arise out of the estate of the covenantor; and therefore, if one refuses, he who is next in remainder shall not take presently but the covenantor shall keep it:" (*Rector of Chedington's case*, 2 Mod. 207; *Paget's* (*Lord*) *case*, 1 Leon. 200.)

Requisites to support a covenant to stand seised.

In order to raise a covenant to stand seised to uses, it is necessary that the covenantor should be seised at the time of making the covenant; that the covenant should be by deed, and not by parol; and that it should be on sufficient consideration (as natural love and affection, which is for advancement of blood; or marriage, which is the joining of the blood and marriage together; for other considerations, as money, are insufficient), otherwise no use will arise: (Carter, 138; Lill. Abr. 358; Com. Dig. Cov. (A 4); Garranty (A); Bac. Abr. Cov. (B); Vin. Abr. Cov. (G).)

Defective conveyance may sometimes be effectual as a covenant to stand seised.

But where there is a sufficient consideration, a defective conveyance, and incapable of operating as such, may yet be effectual as a covenant to stand seised; therefore a deed of bargain and sale from a father to his son, which (money forming no part of the consideration) could not operate by way of bargain and sale, has been allowed, in respect of the intent of the parties, to operate by way of covenant to stand seised: (*Crossin* v. *Scudamore*, 2 Lev. 9; *Walker* v. *Hale*, *ib.* 213; *Osman* v. *Sheafe*, 3 Lev. 370; *Mudge* v. *Mudge*, Com. 334; *Thompson* v. *Attfield*, 1 Vern. 40; *Thorne* v. *Thorne*, *ib.* 141.) So also a defective feoffment has been allowed to operate as a covenant to stand seised: (*Habergham* v. *Vincent*, 2 Ves. 226.)

Distinction between

The late Mr. Butler, in his valuable edition of

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conveyances to uses, and conveyances at common law.

Fearne's Contingent Remainders, has very ably pointed out the distinction between conveyances at common law, and those which derive their effect through the Statute of Uses. "A feoffment, fine or recovery," he remarks, "are conveyances at the common law, so far as they convey the land to the feoffee, conusee or recoveror; if they are directed to operate to, or to the use of the feoffee, conusee or recoveror, they have no other operation than as conveyances at the common law (*Jenkins* v. *Young*, Cro. Car. 230; *Altham* (*Lord*) v. *Anglesea* (*Earl of*), Gilb. Rep. 16); but if they are directed to operate to the use of any other person, then, though they are conveyances at common law so far as they convey the land to such feoffee, conusee or recoveror, they derive their effect under the Statute of Uses, so far as the use is limited by them to the person or persons in whose favour it is declared. A lease and release," he observes, "has a mixed operation; the lease has the operation of a bargain and sale, and is in effect a bargain and sale under the statute; but the fee passes to the lessee, and enlarges his estate to an estate of inheritance by the operation of the release at common law; and if the release is directed to operate to the use of the releasee, he is in by the common law; but if the use be declared in favour of another person, the statute again intervenes and executes the use in the person or persons in whose favour it is declared. A bargain and sale enrolled, and a covenant to stand seised, wholly derive their effect from the Statute of Uses; neither having any effect at common law, independently of the statute, in conveying the land from the party selling or covenanting to stand seised to those in whose favour they are intended to operate; so that at common law they have no legal operation, and are merely declarations of trust binding the land

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in equity. But the statute attaches on them, and divests the land from the party selling or covenanting to stand seised, and vests in the person to whose use it is limited:" (Butler's Fearne, 416.)

Use cannot be limited on a use.

But as a use cannot be upon a use, it cannot be limited by a bargain and sale to any but the bargainee, though an estate limited to arise out of his seisin would be good as a trust in equity. And the like doctrine holds in the case of an appointment in execution of a power, which does not operate as a conveyance of the possession of the estate, but as a limitation of a use, which the statute executing into possession, thus vests the legal estate in the appointee, who is, in fact, the *cestui que use*, and takes in the same manner, when he actually does take, as if he had been named in the original deed by which the power was created: (1 Prest. Abs. 313; Co. Litt. 272, *a*; 10 Ves. 264.) So, if a simple appointment were made to a purchaser, *habendum to him and his heirs, thus vesting the fee in him*, and then limiting the lands to such uses as he should appoint, as in the ordinary dower uses, an appointment afterwards made by him under those limitations would be void in law, although good as a trust in equity. To prevent an occurrence of this kind, the practice has been, in all well-penned appointments where dower uses are inserted, to appoint that the parcels shall be to such uses as the purchaser shall appoint (previously to limiting any estate to the purchaser himself), and in default of appointment, to the purchaser for life, with remainder to a trustee during his life and in trust for him; with the ultimate remainder to him in fee; so that the limitation over in fee will be a remainder, and any appointment made by the purchaser will take effect in the same manner as if inserted in the original deed by which the power was created,

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and thus the purchaser's appointee would be in under the original conveyance, and under a title paramount to the claims of the wife: (see Wat. Convey. by Morley, Coote and Coventry, 88; Butler's note to Fearne, C. R. 347.) Upon the principle, also, that a use cannot be upon a use, if lands are limited to A. to the use of B., to the use of, or in trust for C., C. will take a mere equitable estate: (*Sympson* v. *James*, 1 Eq. Ca. Abr. 383; *Whetstone* v. *Bury*, 3 P. Wms. 146; *Wagstaffe* v. *Wagstaffe*, *ib.* 258; *Attorney-General* v. *Scott*, Forrest, 138; *Venables* v. *Thorne*, 7 T. R. 342, 438.) So also if lands be limited to A. B. and his heirs, *to the use of himself* (A. B.) and his heirs, to the use of, or in trust for C. D. and his heirs, the statute will execute the use in A. B., and C. D. will only take a trust estate: (*Doe dem. Lloyd* v. *Passingham*, 6 B. & C. 305.)

Distinction between uses and trusts.

And when lands are limited to trustees in trust to receive the rents and profits, and pay them over to B., B. will only take a trust estate, and not a use executed under the statute; because B.'s interest is not of that nature as would have been construed a use previously to the statute, and it is only such that it will execute into possession; for, in the case of a use, the feoffees did not actually enter on the lands, or receive the rents and profits, but permitted the *cestui que* use to perform those acts himself; and hence it is that the diversity subsists in the construction of a limitation to A. in trust to permit B. to receive the rents and profits, and a limitation to A. in trust to receive the rents and profits and pay them to B.; for the former being descriptions of a use, the statute will execute it in B., whereas the latter describing a different interest, the statute can have no operation upon it, and therefore the land must remain in the trustee in order to enable him to perform the trust: (*Symon* v. *Turner*, 1 Eq. Ca. Ab. 382; *Bush* v. *Allen*,

5 Mod. 63; *Nevil* v. *Saunders, ib.*; S. C. 1 Vern. 415; *Jones* v. *Say and Sele* (*Lord*), 3 Bro. P. C. 75; *Silvester d. Law* v. *Wilson*, 2 T. R. 444; S. C. 3 Bos. & Pull. 177.

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### 3. *Of the Legal Construction of the several Documents set out in the Abstract.*

Practical remarks.

The construction of the various documents necessary to establish a title is one of the most difficult yet important part of a conveyancer's duties. Sometimes one part of an instrument is repugnant to another, when it becomes a question which is to prevail, and this, in great measure, will depend upon the kind of instrument in which such repugnancy is found. If in a deed, the general rule is that the former clause shall prevail. If in a will, that the latter clause shall control the former one. Still, as will be shown hereafter, these rules are not so universal in their application as not to admit of some exceptions. Another important object to keep in view is, that the same expressions, when inserted in a deed, will receive a different interpretation when found in a will; as in the instance of a devise to a man and his heirs male, which will create an estate tail in a will, though a conveyance in similar term by deed would have passed an estate in fee simple: (1 Prest. Est. 526.) The same observations are also applicable to different kind of assurances by deed; as in the case of conveyances by grant and release, and by appointment, or bargain and sale. If the conveyance were by grant and release, and the lands were to be limited to A. and his heirs, to the use of, or in trust for B. and his heirs, the statute would execute the use in B., and he would (as we have already seen) take a legal estate; whilst if similar expressions had been used in an assurance by way of appointment, or bargain and sale, the use would have become executed in A., and B. would

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have taken a mere equitable estate: (see *ante*, p. 291.) And the same expressions, even when contained in two instruments of the same kind, may operate differently in consequence of having been made at different periods of time; as in the case of the wills of testators dying prior to and subsequently to the operation of the late will act, 1 Vict. c. 26. In the first instance, a devise of a house or land to A. would have given him an estate for life only, on account of no words of limitation having been annexed to the devise: (*Denne and Moor* v. *Mellor*, 5 T. R. 558; *Doe dem. Palmer* v. *Richards*, 3 T. R. 358; *Doe dem. Snell* v. *Allen*, 497; *Doe dem. Norris* v. *Tucker*, 3 B. & Ad. 773.) In the latter case he would have taken the fee ; as, under the statute above referred to, no words of limitation are necessary; it being sufficient for that purpose to name the devisee, and to describe the property so as to leave no doubt as to its identity.

The same words will receive a different construction when applied to different kinds of property.

The same words also, when applied to properties of different tenures, as freehold and leaseholds, for instance, will receive a different construction. For the same words which would pass an estate tail in freeholds, will pass the absolute interest in personal estate: (*Freyes* v. *Robinson*, Bunb. 38; *Bennett* v. *Lewknor*, Roll. Rep. 356; *Love* v. *Wyndham*, 2 Ch. Rep. 14; S. C. 1 Lev. 290; *Richards* v. *Bergavenny*, 2 Vern. 324; *Dod* v. *Dickenson*, 8 Vin. 451, pl. 25; *Stratton* v. *Payne*, 2 Eq. Ca. Abr. 325; *Butterfield* v. *Butterfield*, 1 Ves. sen. 33; *Glover* v. *Strothoff*, 2 Bro. C. C. 33; *Robinson* v. *Fitzherbert*, *ib.* 127; *Earl of Chatham* v. *Daw Tothill*, 7 Bro. P. C. 453; *Chandless* v. *Price*, 3 Ves. 99; *Croke* v. *De Vandes*, 9 Ves. 197; *Ware* v. *Polhill*, 11 Ves. 257 ; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & Bea. 63 ; *Elton* v. *Eason*, 19 Ves. 73; *Bennett* v. *Earl of Tankerville*, *ib.* 170; *Brounker* v. *Bagot*, *ib.* 574; *Britton* v. *Twining*, 3 Mer. 176; *Crawford* v. *Trotter*,

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4 Mad. 360.) The same terms may also pass a different interest when they relate to an equitable, than they would if applied to a legal estate: (*Papillon* v. *Voice*, 2 P. Wms. 471; *Leonard* v. *Sussex*, 2 Vern. 525; *Stamford* (*Earl of*), v. *Hobart*, 3 Bro. P. C. edit. Toml. 31; *Horne* v. *Barton*, Coop. 257); or when applied to persons standing in a particular degree of relationship to each other: (*Morgan* v. *Griffith*, Cow. 234; *Tyte* v. *Williams*, Ca. temp. Talb. 1; *Brice* v. *Smith*, Willes, 1; *Preston and Eagle* v. *Funnell*, *ib.* 164; see also *infra*, pp. 318, 319.)

General rule of construction when one part of an instrument is repugnant to another.

As a general rule, in the case of a deed, where the clauses have been repugnant to each other, the former clause has been allowed to prevail, though its effect would be to annihilate the latter one altogether; as if a grant were to be made to A. and his heirs in the premises, and by the *habendum* the limitation was to be restrained to his life, the *habendum* would be rejected as repugnant to the estate of inheritance conferred on him by the premises, which a subsequent clause would not be permitted to divest: (21 Hen. 6, c. 7; 2 Rep. 23; 8 Rep. 56; Prest. Shep. Touch. 102.)

How far the habendum will be allowed to explain the premises.

But the *habendum* may explain what particular kind of heirs were intended, without being considered repugnant to the grant; therefore a limitation to A. and his heirs, *habendum* to A. and the heirs of his body, would not be considered as inconsistent; but the *habendum*, explaining the particular kind of heirs, cuts down what would otherwise have been an estate in fee-simple into an estate tail: (8 Co. 154, b.) And, although the general rule of law is, that where there is any repugnancy between the premises and the *habendum*, the former shall operate and the latter be rejected, there are still certain circumstances under which the *habendum* will be allowed to supersede the former; as where the property is so limited that the grant is made to a person in-

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capable of taking under it, an instance of which occurred in *Spyve* v. *Topham* (3 East, 155). In that case the lease for a year was made to Bass, and the release, which was between one Thickerton, of the first part, Topham, of the second part, and Bass, as a trustee for Topham, of the third part, in consideration of 700*l.* paid by Topham, it was witnessed that Thackery confirmed to Topham and his heirs, *to hold* to Bass and his heirs to uses, which gave Topham a power of appointment. Now as the lease for a year was made to Bass, Topham had no estate which was capable of an enlargement; and it was, therefore, urged, that as Bass was named in the *habendum* only, and not in the granting clause of the lease, he would not be deemed the releasee. The court, however, rejected the grant or release to Topham, and treated Bass, though named in the *habendum* and omitted in the premises, as the releasee; the judges at the same time observing, that the cases cited (1 Inst. 7; Shep. Touch. 75; *Butler* v. *Elton*, Carey, Rep. Chan. 122; *Earles* v. *Lambert*, Alleyn, 41; in opposition to *Bustard* v. *Coulter*, Cro. Eliz. 903) were perfectly satisfactory in authorizing them to put a construction upon the deed in support of it, which, from the reason and sense of the thing, they should probably have done without such authorities. But, generally speaking, where one person is named as a grantee in the premises, and the other in the *habendum*, the grantee named in the premises would take, to the exclusion of the grantee in the *habendum;* unless, indeed, the assurance were effected by a feoffment; for then it seems whichever grantee received the livery of seisin would have the preference, without respect to the order in which their names were respectively mentioned in the charter; livery of seisin being, in fact, the essential part of a feoffment: (1 Prest. Abs. 98, 99.)

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It seems also to have been formerly considered that a limitation of all the estate of a term of years in the premises could not be controlled by the *habendum* to give a partial interest by way of underlease; but the law is otherwise now; for the rule at present seems to be, that the effect of the grant and *habendum* collectively taken are to demise the land and all the estate for a term of years; so that there is no repugnancy or inconsistency: (*Earl of Derby* v. *Taylor*, 1 East, 502.) Yet it seems that if the assignment contain a grant of all the estate, &c. and by the *habendum* the term is limited to commence from a future day, as the premises will pass all the time of the term, it will be repugnant to the *habendum;* for no assignment can be good unless it creates an immediate tenancy, or, in other words, privity, between the assignees and the reversioner: (*Jermyn* v. *Orchard*, Show. P. C. 109.) In such case, therefore, the *habendum* will be deemed repugnant, and, falling within the direct principles of the general rule above laid down, be rejected accordingly. But unless all the estate be limited in the premises, a grant of the lands held for a term to commence from a future day, or upon the happening of an event, is good; as, for example, suppose a lessee grant to A., that if J. S. shall die, A. shall have his term, this is a good grant and the term is to pass on contingency; and the grant is suspended in operation, in respect of vesting of the estate, until the contingency happens: (Prest. Shep. Touch. 79; Plow. 524; 7 Taunt. 267.)

As to terms of years.

The general rule in wills, as I have already mentioned, is, that where two parts are repugnant to each other, so that they cannot possibly both take effect, the latter clause shall prevail: (Co. Litt. 112, *b; Ulrich* v. *Litchfield*, 2 Atk. 372; *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100; *Doe dem.*

As to wills.

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*Leicester* v. *Biggs*, 1 Taunt. 109.) The case of *Crowe* v. *Odell* (1 Ball & Beat. 449, and 3 Dow. 61) affords a good exemplification of this doctrine. There a testator devised the residue of his real and personal property to his children, A., B., and C., and their younger children, their heirs, executors, administrators and assigns, for ever, which made it a clear joint devise; but he afterwards went on to declare that, nevertheless, his intentions were that A. should receive the entire interest, or yearly produce, of such part of his real or personal fortune, as he (the testator) intended for his younger children, *during his life*. The testator then made a similar direction as to B. and C.; and he provided that, in case any of his said children should die, the share of such should go to the younger children of such children; if no younger children, to the survivors. And he gave the parents a power of distribution among their younger children. Lord Clare, when Chancellor of Ireland, had held the parents and children to be entitled jointly; but Lord Manners afterward determined that the parents took life estates only, with a power of distribution among their children; which decree was affirmed in the House of Lords.

# CHAPTER V.

## THE INVESTIGATION OF THE TITLE OF FREEHOLD ESTATES.

I. WHAT WORDS ARE NECESSARY TO CREATE AN ESTATE IN FEE-SIMPLE.

II. THE FEE MAY PASS IN A WILL WITHOUT WORDS OF LIMITATION.

1. *What Words would have passed both the Subject and the Fee.*
2. *Untechnical Expressions, when sufficient.*
3. *An Estate in Fee may be raised by Implication.*
4. *Effect of subjecting Lands to a Charge.*
5. *When a Testator directs an Act to be done which a Life Estate might have proved insufficient to accomplish.*
6. *Effect of a Devise in Fee to Trustees upon Trust Estates.*
7. *Powers of Disposition over the Property.*

III. CONSTRUCTION OF WILLS WITH RESPECT TO TRUSTS AND POWERS OF SALE.

1. *Where the Property is directed to be sold without stating by what Persons the Sale is to be made.*
2. *Whether an Authority given to several will survive.*

3. *Whether Power of Sale can be exercised when some of the Donees refuse to concur.*

IV. Of Estates Tail.

1. *Of the enactments of stat.* 1 *Vict. c.* 26, *respecting Estates Tail.*
2. *Of the Rule in Shelley's case.*
3. *Application of the Rule as to Equitable Estates.*
4. *Of the Cy. Pres. Doctrine*
5. *Application of the Rule in Shelley's case to Copyholds.*
6. *As to Estates for Years.*
7. *What Terms will supply the place of regular Words of Limitation.*
8. *When an Estate Tail will arise by Implication.*
9. *Cross Remainders.*

V. Of Estates in Joint Tenancy, and Tenancy in Common.

1. *Of the Construction of Deeds and Wills with respect to the Creation of these Estates.*
2. *The Construction of a Joint Tenancy favoured in the case of Executory Trust.*
3. *Words importing a Division will not always create a Tenancy in Common.*

VI. Of Contingent Remainders, Conditional Limitations, and Executory Devises.

1. *Of the Distinction between Contingent Remainders and Conditional Limitations.*
2. *Distinction between an Executory Devise and a Contingent Remainder.*

3. *How Contingent Remainder might have been destroyed.*
4. *Recent Enactments respecting Executory Devises and Contingent Remainder.*
5. *Whether Conditional Limitations are capable of being barred.*
6. *Of the Requisites to support a Conditional Limitation.*
7. *What Conditions may be valid.*
8. *How a Conditional Limitation will be affected by the Failure of the Estates to which it is annexed.*
9. *Impossible Conditions.*
10. *Conditions in Restraint of Marriage.*

VII. Of the Doctrine of Election.

1. *Definition of the Doctrine of Election.*
2. *What will be sufficient to put a Party to his Election.*
3. *What Persons will be bound to elect.*
4. *What Acts will amount to an Election.*
5. *Application of the devised Property when the Party put to his Election chooses to take in Opposition to the Will.*

VIII. Of Resulting Trusts.

1. *What will be sufficient to raise a Resulting Trust.*
2. *As to Admissibility of Parol Evidence.*
3. *As to Purchases made with Trust Moneys.*
4. *As to Misappropriated Funds.*

IX. As to Illusory Appointments.

1. *What Appointments would have been considered as illusory.*
2. *Recent Enactments respecting.*

X. EFFECT OF NEW WILL ACT UPON GENERAL DEVISES OF REAL PROPERTY.

1. *As to Estates acquired subsequently to the Will.*
2. *As to lapsed Devises.*

XI. EFFECT OF SUBSEQUENT CONVEYANCES ON PRE-EXISTING WILL.

1. *Old Law respecting.*
2. *Effect produced by recent Enactments.*

XII. OF THE DOCTRINE OF MERGER.

XIII. COVENANTS.

1. *Covenants for Title.*
2. *Distinction between General and Qualified Covenants.*
3. *What Covenants are considered as synonymous.*
4. *Of Covenants for Quiet Enjoyment.*
5. *Covenants for further Assurance.*

XIV. AS TO THE EXECUTION AND ATTESTATION OF DOCUMENTS.

1. *As to Deeds.*
2. *As to Powers.*
3. *As to Wills.*

XV. OF THE REVOCATION OF WILLS.

1. *Enactments of the Statute of Frauds respecting.*
2. *Operation of the statute,* 1 *Vict. c.* 26.
3. *Effect of Tearing, Burning, or Destruction.*
4. *Alteration and Erasure.*
5. *Revocation made under a Misapprehension of Facts.*

XVI. Of the Republication of Wills.

1. *Old Laws relating to.*
2. *Recent Enactments respecting.*
3. *Effect of Republication.*

XVII. Descents.

1. *Old Law with respect to Descents.*
2. *Recent Enactments respecting.*

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## I. What Words are necessary to create an Estate in Fee-Simple.

Of the exposition of deeds and wills.

The law has always allowed a more liberal construction in favour of a will than of a deed; because in the exposition of the former, the law has rather inclined to regard the intention of the testator than the precise legal import of the terms he has employed to express it (*Loveacres* v. *Blight*, Cow. 235); wills being so often made when a testator is suffering from sickness or debility, and not unfrequently when he is actually on his death-bed, and unable to obtain that professional assistance of which a party to a deed may generally avail himself. Hence, even previously to the late Will Act (1 Vict. c. 26,) which enables a testator to pass an estate in fee-simple without any words of limitation (sect. 28), an estate in fee-simple, would, where the intent was manifest, have passed without words of limitation: an estate tail without words of procreation. An estate either in fee, in tail, or for life (*Tilley* v. *Collyer*, 3 Keb. 589; *Fowler* v. *Backwell*, Com. 353; *Moone dem. Fagge* v. *Heaseman*, Wils. 38; *Toovey* v. *Bassett*, 10 East, 460; *Langley* v. *Baldwin*, 1 P. Wms. 759; *Stanley* v. *Lennard*, 1 Eden, 87; *Attorney-General* v. *Sutton*, 3 Bro. P. C. 75; *Doe dem. Bean* v. *Halley*, 8 T. R. 5; *Mackel* v. *Weeding*, 8 Sim. 4; Year Book, 13 Hen. 7, fol. 17; Bro. Dev. pl. 521; 8 Ven. 214,

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pl. 5 ; 2 Freem. 270 ; T. Jones, 98 ; 1 Eq. Cas. Abr. 197 ; *City of London* v. *Garway*, 2 Vern. 572 ; *Hutton* v. *Simpson*, *ib.* 723 ; S. C. under the name of *Simpson* v. *Hornsby*, Gilb. Eq. Rep. 115 ; *Dashwood* v. *Peyton*, 18 Ves. 40 ; *Dyer* v. *Dyer*, 1 Mer. 414; *Doe dem. Driver and another* v. *Bowling*, 5 B. & Ald. 772), accordingly as the intention appeared, might also have been raised by implication, without any direct terms of devise whatever. Real property also may pass, although no mention whatever is made of it ; when the intention is apparent, as where a testator appoints a person to be his heir : (*Inkerdal's case*, Bro. Dev. 38; *Taylor* v. *Webb*, Str. S. C. 301; *Marrett* v. *Sly*, 2 Sid. 75; *Tilley* v. *Collyer*, 3 Keb. 589.) The Will Act above alluded to (1 Vict. c. 26) has extended this liberal construction still further, as I shall by-and-by notice ; but as this enactment does not affect wills made prior to January, 1838, it will be necessary, first of all, to ascertain how the law stands independently of that act, in order to see how titles may be affected by wills made previously, as also to ascertain what important changes it has accomplished, and how titles will be affected by wills now brought within its operation.

Of the distinction between deeds and wills where the regular words of limitation are omitted.

In a deed, if lands are limited to a man generally without words of limitation, he will take a life estate only (Co. Litt. 112 ; *Chapman* v. *Dalton*, Plow. 286) ; with the single exception of a gift to a man and his wife in frank-marriage, which would have raised an estate tail (Lit. s. 17 ; Wood's Ins. 120) ; but no other gift or grant, even though it were expressive of the estate the grantor intended to pass, as to the grantee in fee-simple, can confer more than a life interest. But in a will, as Lord Coke aptly observes (*Lord Cheyney's case*, 5 Rep. 68), the intention of the testator is to be the pole star to

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guide the judges in the exposition; in which respect it differs from a deed, where the rule of construction is, that the words must follow the intent of the grantor. When, therefore, this intention has appeared, the courts have allowed terms descriptive both of the subject and the testator's interest therein to pass them both. In other instances they have allowed untechnical expressions to supply the place of proper words of limitation; and where the intent has been manifest, the fee has been raised by implication. So where lands have been devised without words of limitation, but subjected to a charge; or the devisee was directed to give or forego any benefit, it would have conferred the fee upon him; and whenever a testator directed a thing to be done, which a mere life estate *might* be unable to carry into effect, the fee would have passed in precisely the same manner as if the regular words of limitation had been annexed to the devise. Whenever also lands were devised without words of limitation, but the devisee had an absolute power of disposition conferred upon him, he was construed to take an estate commensurate with his power. And now under the recent statute 1 Vict. c. 26, an estate in fee will pass without any words of limitation being annexed to the subject-matter of devise. Still this does not render it less necessary that a person who investigates a title should be thoroughly acquainted with the rules of law relative to the construction of wills made previously, as questions must continue to arise upon this subject for many years to come.

## SECTION II.

### II. The Fee may pass in a Will without Words of Limitation.

1. *What Words would have passed both the Subject and the Fee.*
2. *When Untechnical Expressions will supply the place of Proper Words of Limitation.*
3. *An Estate in Fee may be raised by Implication.*
4. *Effect of subjecting Lands to a Charge.*
5. *When a Testator directs an Act to be done which a Life Estate might have proved insufficient to accomplish.*
6. *Effect of a Devise in Fee upon Trust Estates.*
7. *Power of Disposition over the Property.*

### 1. *What Words would have passed both the Subject and the Fee.*

What words are capable of passing both the subject-matter of devise and all the testator's interest therein.

A learned judge once said (Wilmot, J. in *Scott* v. *Alberry*, Com. 337), that whenever it appeared plainly that a testator intended to devise a fee, it is immaterial what words he makes use of. Hence certain words have been permitted not only to be descriptive of the subject, but also to embrace all the testator's interest therein. Thus the word "estate" (*Wilson* v. *Robinson*, 2 Lev. 91, 1 Mod. 100; *Reaves* v. *Winnington*, 3 Mod. 45; *Hyley* v. *Hyley*, *ib.* 228; *Moor* v. *Price*, 3 Keb. 49; *Carter* v. *Horner*, 1 Show. 349; *Lane* v. *Hawkins*, 1 Show. 396; *Bridgwater* (*Countess of*) v. *Bolton* (*Duke of*), 1 Salk. 236; *Hopewell* v. *Ackland*, *ib.* 239; *Murray* v. *Wise*, 2 Vern. 564; *Beachcroft* v. *Beachcroft*, *ib.* 690;

Word "estate" sufficient to pass the fee.

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*Shaw* v. *Bull*, 12 Mod. 594 ; *Cliffe* v. *Gibbons*, 2 Lord Raym. 1324 ; *Scott* v. *Alberry*, Com. 337 ; *Barry* v. *Edgworth*, 2 P. Wms. 523 ; *Chester* v. *Painter*, *ib.* 235 ; *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157 ; *Tanner* v. *Wise*, *ib.* 284 ; S. C. 3 P. Wms. 295 ; *Tuffnell* v. *Page*, 2 Atk. 38 ; *Timewell* v. *Perkins*, *ib.* 102 ; *Ridout* v. *Pain*, 3 *ib.* 486 ; S. C. 1 Ves. sen. 10; *Bailis* v. *Gale*, 2 *ib.* 48 ; *Macaree* v. *Tall*, Ambl. 181 ; *Styles dem. Rayment* v. *Walford*, 2 W. Blackst. 938 ; *Arminter's case*, Lofft, 95 ; *Chesterton* v. *Chesterton*, *ib.* 100 ; *Holdfast dem. Cowper* v. *Marten*, 1 T. R. 411 ; *Burkett* v. *Chapman*, 1 H. Blackst. 2231 ; *Fletcher* v. *Smiton*, 2 T. R. 656 ; *Doe dem. Morris* v. *Underdown*, Willis, 296 ; *Doe* v. *Woodhouse*, 4 T. R. 89 ; *Doe dem. Child* v. *Wright*, 8 *ib.* 64 ; S. C. 1 Bos. & Pull. N. R. 335 ; *Chichester* v. *Oxenden*, 4 Taunt. 176, 4 Dow. 92 ; *Uthwatt* v. *Bryant*, 6 Taunt. 317 ; *Jongsma* v. *Jongsma*, 1 Cox, 362; *Doe dem. Dacre* (*Lady*) v. *Roper*, 11 East, 518 ; *Roe dem. Child* v. *Wright*, 7 East, 259 ; *Price* v. *Gibson*, 2 Eden, 115 ; *Roe dem. Allport* v. *Bacon*, 4 M. & S. 366 ; *Pettiward* v. *Prescott*, 7 Ves. 541 ; *Wilkinson* v. *Robinson*, 1 Taunt. & Brod. 172 ; *Doe dem. Penwarden* v. *Gilbert*, 3 Bro. & Bing. 85 ; *Charlton* v. *Taylor*, 3 Ves. & Bea. 160 ; *Gardner* v. *Harding*, 3 Moore, 565), or any corresponding term, has been held sufficient to pass the fee ; and although a local description be added, as "my estate in or at A." (*Barry* v. *Edgeworth*, 2 P. Wms. 523 ; *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157 ; *Tuffnell* v. *Page*, 2 Atk. 37 ; *Macaree* v. *Tall*, Ambl. 181 ; *Holdfast dem. Cowper* v. *Marten*, 1 T. R. 140 ; *Doe dem. Child* v. *Wright*, 8 T. R. 64 ; *Uthwatt* v. *Bryant*, 6 Taunt. 317 ; *Randall* v. *Tuchin*, 6 Taunt. 410; *Denn dem. Richardson* v. *Wood*, 7 Taunt. 35); or "my estate of A." (*Chichester* v. *Oxenden*, 4 Taunt. 176 ; S. C. on appeal, 4 Dow.

Local description annexed to the word "estate" insufficient to confirm the devise to the subject.

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Additional description to the word "estate" will not restrain its general import.

The word "estates" in the plural number will receive the same construction as the word "estate."

When the comprehensive import of the word "estate" may be restricted.

When the word "estate" may be restrained to

92 ; *Gardiner* v. *Harding*, 3 Moore, 565 ; *Pettiward* v. *Prescott*, 7 Ves. 541), it will be insufficient to confine the devise to the subject, but will embrace the whole of the testator's interest therein. Neither would an additional description annexed to the word "estate," have restricted its general import, as "all that estate I bought of M." (*Bailis* v. *Gale*, 2 Ves. sen. 48), or "all my freehold estate, consisting of thirty acres of land, more or less, and all erections of the said farm, situate," &c. (*Gardiner* v. *Harding*, 3 Moore, 565), or "all my estate, lands, &c. called or known by the name of the Coal-yard, in the parish of St. Giles, London :" (*Roe dem. Child* v. *Wright*, 7 East, 259.) The word "estates" in the plural number, whatever doubt may once have been entertained on the subject (as to which see *Goodwyn* v. *Goodwyn*, 1 Ves. sen. 226), it is now determined, will receive the same construction as the word "estate" in the singular : (*Macaree* v. *Tall*, Amb. 181 ; *Tilley* v. *Simpson*, in a note to *Fletcher* v. *Smiton*, 2 T. R. 656 ; *Fletcher* v. *Smiton*, *ib.* ; *Jongsma* v. *Jongsma*, 1 Cox, 362 ; *Randall* v. *Tuchin*, 6 Taunt. 410 ; *Roe dem. Allport* v. *Bacon*, 4 Mau. & Selw. 366.)

But the word "estate," notwithstanding its comprehensive import, may yet be restricted to a more limited meaning when it is obvious that such was the testator's intent. Hence, where he confines it to an express life estate, as occurred in the case of *Price* v. *Gibson* (2 Eden, 115), where the testator devised all his estate at C. H. to A. for life, remainder to B. and C. which was held to pass a life estate only to A. So where a devise was of "my real estate at B." with limitations in strict settlement: (*Hodges* v. *Middleton*, Doug. 415 ; *Bruce* v. *Bainbridge*, 5 Moore, 1; 1 Bro. & Bing. 123.) The word "estate" may also be restrained to mean things of the same kind with which it is associated. If, therefore,

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it be coupled with articles of a personal kind, it will be considered to relate to personalty only. Hence, where a testator, after a specific devise of a real estate called Whiteacre, devised "all the residue of his leases, mortgages, *estates*, debts, moneys, and *other* goods," &c. the word "estates" was held to be confined to the chattels only: (*Wilkinson* v. *Merryland*, Cro. Car. 447; S. C. 1 Eq. Ca. Abr. 178.) In *Timewell* v. *Perkins* also (2 Atk. 102) a limitation of "all other the rest, residue, and remainder of my *estate, consisting of* ready money, plate, jewels, leases, judgments, and mortgages," was confined to the kind of property with which it was thus associated, and of which the testator expressly stated it to have consisted. Yet, for all this, the mere circumstance of the word "estate" being in the same sentence with an enumeration of chattels, will not so inseparably connect itself with them as to deprive that term of its more comprehensive signification. If inserted so as to precede the enumeration, it may yet relate to real estate not previously disposed of (*Fletcher* v. *Smiton*, 2 T. R. 656; *Tanner* v. *Morse*, Ca. temp. Talb. 284); and even if inserted after an enumeration or description of chattels sufficient to comprehend the whole personal property, the construction will be the same, and when thus extended to real estate it will comprehend the entire interest of the testator therein (*Terrell* v. *Page*, 1 Eq. Ca. Abr. 209, c. 11; *Scott* v. *Alberry*, Com. 337; *Tilley* v. *Simpson*, stated 2 T. R. 659, n.; *Jongsma* v. *Jongsma*, 1 Cox, 362; *Doe dem. Evans* v. *Evans*, 9 Ad. & Ell. 719), upon the principle laid down by Lord Chancellor Talbot in *Ibbetson* v. *Beckwith* (Ca. temp. Talb. 157), where he says, that if the words of the will be general, and taking the testator's words in one sense will make the will to be a complete disposition of the whole; whereas, taking them

mean things of the same import as those with which it is associated.

The word "estate" associated with chattels not alone sufficient to restrain its more general signification.

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in another, it will create a chasm, they shall be taken in that sense which is most likely to be agreeable to his intention of disposing of his whole estate.

Other words capable of passing both the subject and all the testator's interest.

The word "estate" is not the only one which will comprehend both the subject and the absolute interest; for the word "property," unless restrained by the context, will be of equal force with the word "estate:" (*Doe* v. *Lainchbury*, 11 East, 290; *Doe dem. Dacre* v. *Rohn*, ib. 518; *Nicholls* v. *Butcher*, 18 Ves. 193; *Roe* v. *Pattison*, 16 East, 221; *Patton* v. *Randall*, 1 Jac. & Walk. 189; see also *Doe, lessee of Wall*, v. *Langlands*, 14 East, 371; *Noel* v. *Hoy*, 5 Mad. 38.) But the word "property," like the word "estate," when coupled and associated with chattels, will be construed to relate to personal property only: (*Bunny* v. *Rout*, 7 Taunt. 79.) A reversion (*Bailis* v. *Gale*, 2 Ves. sen. 48), or remainder (*Norton* v. *Ludd*, 1 Lutw. 755) may also be devised by those appellations, which will pass the whole interest of the testator, as well as the subject. So a devise of "my moiety of the house in which A. lives," will pass the absolute interest of the testator: (*Doe dem. Atkinson* v. *Fawcett*, 7 Law T. 283.) As will also a devise of "all my right, title, and interest" (*Cole* v. *Rawlinson*, 1 Lord Raym. 331, 1 Salk. 234); or "all my part, share, and interest" (*Andrew* v. *Southhouse*, 5 T. R. 592); or "all I am worth" (*Huxtep* v. *Brooman*, 1 Bro. C. C. 437, cited and approved of by Lord C. J. Gibbs, in *Doe* v. *Rout*, 7 Taunt. 81); or "all that I shall be possessed of, real and personal" (*Pitman* v. *Stevens*, 15 East, 505; *Wilce* v. *Wilce*, 7 Bing. 664; *Thomas* v. *Phelps*, 4 Russ. 348); or "whatever else I have in the world, not before disposed of" (*Hopewell* v. *Ackland*, Com. 164, Cas. temp. Talb. 286), will pass the fee-simple in the property to which those words are annexed. But

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it must at the same time be kept in view, that none of the terms last alluded to will pass the fee, unless they are contained in the devising clause of the will. If used simply in the introductory clause, they will not (as to wills made prior to 1838) vary the construction of a devise afterwards made, if the expressions in the devising clause are insufficient to carry the degree of interest contended for: (*Loveacres* v. *Blight*, Cow. 152; *Wright* v. *Russell*, cited ib. 659; *Wright* v. *Wright*, 2 Wils. 114; *Denn* v. *Gaskin*, Com. 659; *Right* v. *Sidebottom*, Doug. 734.)

Distinction between terms used in the introductory and devising clauses of a will.

Effect of general residuary clause.

And, notwithstanding an estate in remainder or reversion will pass by that appellation, yet the usual terms "rest, residue, and remainder," as relating to residuary property undisposed of by the will, will not (except as to wills made after 1838) be capable of enlarging any devise of real estate to which they may relate, beyond a mere life interest: (*Canning* v. *Canning*, Mos. 240; *Denn dem. Moor* v. *Mellor*, 5 T. R. 502; *Doe dem. Snall* v. *Allen*, 8 T. R. 147.) The word "inheritance" is sufficient of itself to pass the fee (*Widlake* v. *Harding*, Hob. 2; *Purefoy* v. *Rogers*, 2 Saund. 388), as is also the word "fee-simple" (*Baker* v. *Raymond*, Anders. 51; Bro. Dev. C.; Gilb. Dev. 18; Perk. s. 557); but the word "hereditaments," though strictly applicable only to an estate of inheritance, will not have that effect (*Hopewell* v. *Ackland*, Salk. 338; *Canning* v. *Canning*, Mos. 240; *Doe dem. Palmer* v. *Richards*, 3 T. R. 356); neither will the word "lands" standing alone be sufficient, although the word "freehold" be adjunct to it (*Lee* v. *Withers*, T. Jones, 10; *Wilson* v. *Robinson*, 2 Wilson, 91; *Denn dem. Moor* v. *Mellor*, 5 T. R. 558; *Doe dem. Norris* v. *Tucker*, 3 B. & A. 471; *Doe dem. Ashley* v. *Baines*, 2 C. M. & R. 23); nor will the word "all," as "I give all to A," be sufficient to comprehend real property. (*Bowman* v. *Milbank*, 1 Lev. 130.)

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When the word "effects" will pass the fee.

The word "effects" is a term of rather equivocal import, yet, upon the whole, more applicable to personal than to real property (*Camfield* v. *Gilbert*, 3 East, 519; *Hick* v. *Dring*, 2 Mau. & Selw. 455; see also *Doe dem. Chilcot* v. *White*, 1 East, 33; *Macnamara* v. *Whitworth* (*Lord*), Coop. 241; *Rawlings* v. *Jennings*, 13 Ves. 39); but if the term "real" (*Doe* v. *Clark*, 2 Bos. & Pull. N. R. 243; *Hogan dem. Wallis* v. *Jackson*, Cow. 29; *Doe* v. *Lainchbury*, 11 East, 290), or "testamentary" (*Doe dem. Penwarden* v. *Gilbert*, 2 Bro. & Bing. 85), be annexed to it, or from the general context it appears that the testator intended to apply it to real property, then not only will it be allowed to pass such property, but the absolute interest therein also: (*Doe* v. *Lainchbury*, 11 East, 290.)

2. *When Untechnical Expressions will supply the place of Proper Words of Limitation.*

Untechnical expressions when sufficient to pass the fee.

There are also some instances in which words of limitation, although not technically correct, have been construed according to the intention, and have been held to pass either a fee-simple or a fee-tail, accordingly as such intention could be collected from the ordinary and general import of the terms employed. Thus, as I have already remarked (*sup.* p. 311), a devise to a man in fee-simple would pass that estate, as will also a devise appointing a person his heir (*Inkersal's case*, Bro. Dev. 38; *Taylor* v. *Webb*, Str. 301; S. C. under the name of *Marrett* v. *Sly*, 2 Sid. 75; *Tilley* v. *Collyer*, 3 Keb. 589); or the executor or executrix of his lands (*Doe dem. Gillard* v. *Gillard*, 5 B. & A. 785; *Doe dem. Crump* v. *Sparkes*, 1 Dow. & Ry. 497; *Noel* v. *Hoy*, 5 Mad. Rep. 38; *Hickman* v. *Hazlewood*, 6 Ad. & Ell. 167); or devising to a man *in perpetuum* (2 Blac. Com. 108), or for ever (*Whiting* v. *Wilkins*, 8 Viner's Abr. 208; S. C. 1 Bulstr.

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219 ; *Heath* v. *Heath*, 1 Bro. C. C. 148) ; or "to a man and his blood," for the blood runs through the collateral heirs as well as the lineal (Co. Litt. 6 ; 1 Prest. Estates, 84), will pass the fee-simple. Whether a devise to a man and his *posterity* will pass the fee or an estate tail, is a doubtful point, though it seems clear that a devise to a man *et semino suo* will pass an estate tail. A devise to a man and his heir in the singular number (1 Roll. Abr. 833 ; Plow. 288 ; *Snell* v. *Read*, 2 Atk. 645) ; or to a man *or* his heirs (*Doe* v. *Stenlake*, 3 East, 515,) will pass the fee, though a limitation in a deed in the same terms would not have passed more than a life estate (5 Co. 112 ; *Chapman* v. *Dalton*, Plow. 286) ; and a limitation to A. and his heirs, male or female, which in a deed would have passed a fee simple (*Abraham* v. *Turig*, Cro. Eliz. 478 ; *Idle* v. *Cook*), when contained in a will, will pass an estate tail: (*Blaxton* v. *Stone*, 3 Mod. 133 ; *Denn* v. *Slater*, 5 T. R. 434.) A devise to A. and his heirs for their lives will vest the fee in A. because there cannot be a succession of heirs for life estates (*Doe* v. *Stenlake*, *supra*) ; but a devise to a man and his assigns will pass an estate for life only (*Fisher* v. *Nicholls*, 3 Salk. 139), where the will is made prior to 1838 ; but a devise in those terms in a will made subsequently would create an estate in fee-simple. (Stat. 1 Vict. c. 26, s. 28.)

3. *An Estate in Fee may be raised by Implication.*

What expressions will be sufficient to raise a fee by implication.

In some cases the fee will pass by implication —one instance is where an estate is devised to one generally without words of limitation, and is limited over on the contingency of the first devisee's dying under the age of twenty-one years (*Fowler* v. *Backwell*, Com. 353 ; *Moone dem. Fagg* v. *Heaseman*, Wils. 38 ; *Toovey* v. *Bassett*,

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10 East, 460) ; for where an estate is directed to be taken from an institute upon a contingency that does not happen, it shall not be taken away by any other circumstance ; and as it appears that the estate of the devisee is to determine only in the event of his death under age, the intent of the testator will be construed to mean that the first devisee should have the fee. Nor will the circumstance of the first devisee being the heir-at-law of the testator be sufficient to vary this construction : (*Frogmorton dem. Bramston* v. *Holliday*, 1 Blac. Rep. 535.) But if the limitation over had been in case the first devisee should die without issue, he would then have taken an estate tail only : (*Dutton* v. *Engram*, Cro. Jac. 427 ; *Roe* v. *Scott and Smart*, Fearne C. R. 473, n. ; *Doe* v. *Fyldes*, Cow. 833 ; *Brice* v. *Smith*, Willes, 1 ; *Denn* v. *Slater*, 5 T. R. 336 ; *Fenny* v. *Agar*, 12 East, 258 ; *Dansey* v. *Griffith*, 4 Mau. & Selw. 61 ; *Raggett* v. *Beattie*, 5 Bing. 243.) And even where the words of limitation are sufficient to pass an estate in fee-simple, as a devise to A. his heirs and assigns, subject to a charge, it may nevertheless be reduced to an estate tail, by a limitation over on failure of his issue, or heirs of his body : (*Dutton* v. *Engram*, Cro. Jac. 427 ; *Roe* v. *Scott and Smart*, Easter, 12 Geo. 3 ; Fearne C. R. 473, n.; *Roe* v. *Avis*, 6 T. R. 605.)

Alterations effected by recent Will Act.

Previously to the late act 1 Vict. c. 26, it was considered as a settled rule of law that, in order to reduce a devise to a man and his heirs to an estate tail by means of a limitation over on failure of issue in the first taker, the failure of issue contemplated, must have been an indefinite failure ; for where the dying without issue was confined to the period within which an executory devise may be limited to take effect, viz. twenty-one years after the lifetime of a person or persons in being, the first devisee would have taken an

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estate in fee, subject to a limitation over by way of executory devise. Thus in *Pells* v. *Brown* (Cro. Jac. 590), where a testator devised to his son B. and his heirs for ever, but if he died without issue *living*, then A. was to have those lands to him and his heirs for ever; it was adjudged that B. took an estate in fee-simple, and that the limitation over to A. was good by way of executory devise: (see also *Hanbury* v. *Cockerell*, 1 Roll. Abr. 835; *Porter* v. *Bradley*, 3 T. R. 143; *Doe dem. Bamfield* v. *Wetton*, 2 Bos. & Pull. 324; *Sheers* v. *Jeffery*, 7 T. R. 589; *Doe dem. Smith* v. *Webber*, 1 B. & A. 713; *Doe dem. King* v. *Frost*, 3 B. & A. 646.) When, therefore, it appeared from the general language of the will that the devise over was only to take effect on an indefinite failure of issue of the first taker to whom the property was devised in terms in other respects sufficient to have passed the fee, such first devisee would have taken an estate tail (*Dutton* v. *Engram*, Cro. Jac. 427; *Roe* v. *Scott and Smart*, Fearne C. R. 473, n.; *Doe* v. *Fyldes*, Cow. 833; *Walter* v. *Drew*, Cow. 372; *Roe* v. *Avis*, 6 T. R. 606; *Fenny* v. *Agar*, 12 East, 258; *Dansey* v. *Griffith*, 4 Mau. & Selw. 61); and where it was restrained to his leaving no issue at the time of his own death, he would have taken an estate in fee-simple, subject to a limitation over by way of executory devise: (*Pells* v. *Brown*, Cro. 590; *Hanbury* v. *Cockerell*, 1 Roll. Abr. 835, pl. 4; *Porter* v. *Bradley*, 3 T. R. 143: *Doe dem. Bamfield* v. *Wetton*, 2 Bos. & Pull. 324; *Sheers* v. *Jeffery*, 7 T. R. 789; *Eastman* v. *Baker*, 1 Taunt. 174; *Doe dem. Smith* v. *Webber*, 1 B. & A. 713; *Doe dem. King* v. *Frost*, 3 *ib.* 546; *Glover* v. *Monckton*, 3 Bing. 15; *Goldin* v *Lakeman*, 2 B. & Ad. 30.)

*Alteration effected in new Will Act.*

Thus stood the law previously to the recent statute, 1 Vict. c. 26, and so it still remains with

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respect to wills made previously to that period; but with respect to those made subsequently, the 29th section of the act has thrown considerable doubt upon the matter. That section enacts, "that in any devise or bequest of any real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want of failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or a preceding gift, being without any implication arising from such words*, a limitation of an estate tail, to such person, or issue otherwise. Provided that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

*As to construction of the terms "dying without issue."*

Now, as the above-mentioned act confines the import of the terms "dying without issue" to the death of the party, it seems to follow, upon the authority of the cases in which the dying without issue has been construed to relate to that period (*Pells* v. *Brown*, Cro. Jac. 590; S. C. 1 Eq. Ca. Abr. 187; *Hanbury* v. *Cockerell*, 1 Roll. Abr. 835, pl. 4; *Porter* v. *Bradley*, 3 T. R. 143; *Doe dem. Bamfield* v. *Wetton*, 2 Bos. & Pull. 324; *Sheers* v. *Jeffery*, 7 T. R. 589; *Eastman* v. *Baker*, 1 Taunt. 174; *Doe dem. Smith* v. *Webber*, 1 B. & A. 713; *Doe dem. King* v. *Frost*, 3 *ib*, 546; *Glover* v. *Monckton*, 3 Bing. 13; *Goldin* v. *Lakeman*, 2 B. & Ad. 30; *Stevens* v. *Glover*, C. P. Apr. 1845), that if the preceding words of limitation were sufficient

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to pass the fee, a limitation over in default of issue would not, as to wills made subsequently to the operation of the act now under discussion (31st Dec. 1837), create an estate tail, but an estate in fee-simple, subject to a limitation over by way of executory devise: (*Stevenson* v. *Glover*, C. P. April 23, 1845.) But where the limitation over is in default of issue, where the devisee has an estate for life limited in express terms, it becomes a far more doubtful matter. It appears from the words of the act, that under a limitation to one for life, and if he should die without issue then over, the first devisee will only take a life estate; although, as the law stood previously, he could have taken an estate tail by implication, in consequence of the limitation over in case of his dying without issue. Now the saving clause to the section above alluded to will not permit an implication arising from the words, "dying without issue," to be construed as an indefinite failure of issue, and by thus restricting the limitation over the first devisee would, it seems, take a mere life interest, and no more: (*Walter* v. *Drew*, Com. 372.) Assuming, therefore, that the first devisee takes only a life estate, are his issue to take anything? And if so, what? It should seem that they would take, and in fee-simple. There appears to be quite enough to raise an estate in them by implication. A limitation to the issue of A. where they took as a class as purchasers, would even before the act have given to every single individual answering that description a life interest (*Cook* v. *Cook*, 2 Vern. 545); and as, by the 28th section, a devise without any words of limitation will pass the fee, the life interest they would formerly have taken will, by the act now under discussion, be extended to an estate in fee-simple, which it seems the issue would take *per capita* as joint tenants, upon the long-established principle, that where an estate is given to a plurality of persons without adding

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any restrictive, exclusive, or explanatory words, it makes them immediately joint tenants: (2 Blac. Com. 180.) But where lands are simply devised to A. with a limitation over to B. in case he shall die without issue, there seems to be no doubt but that A. will take an estate in fee-simple subject to a limitation over to B. by way of executory devise in case A. should leave no issue at his death.

As to a limitation over after dying without heirs generally.

It may be proper to observe that the new Will Act is silent upon the subject of a dying without heirs generally, which, being an event beyond what the law permits for the vesting of an executory devise, would be void for remoteness. The only exception to this rule is, where the person to whom the limitation over is made is a relation of and capable of being the collateral heir of the first devisee, for then the first devisee would be construed to take an estate tail only, and the limitation over would be good; because the latter limitation plainly denotes that only lineal heirs could have been intended, as the first devisee could not have died without heirs as long as the remainder-man, or any of his lineal heirs existed: (*Morgan and Wife* v. *Griffith*, Cow. 224; *Tyte* v. *Willis*, Ca. temp. Talb. 1; *Brice* v. *Smith*, Willes, 1; and see *Preston dem. Eagle* v. *Funnell*, ib. 164.) But to have this operation, the person to whom the estate was limited over must not only be a relation, but also a relation of that character as could have inherited from the first taker (*Attorney-General* v. *Gill*, 2 P. Wms. 369); consequently, prior to the late statute, 3 & 4 Will. 4, c. 166, if the person to whom the land were devised over had been of the half-blood to the first devisee, and, as such, incapable of inheriting, it must have been considered in the same light as a devise over to a stranger (*Tilbury* v. *Barbat*, 3 Atk. 617; 1 Ves. 89); consequently, the first taker would have taken a fee-simple absolute, and the limitation over would

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have failed for remoteness. These cases also afford an example in support of the proposition I have before alluded to, that *the same words will have a different operation when applicable to persons standing in a particular degree of relationship to each other, than they would when applied to strangers.*

Distinction between half blood and whole blood how far exploded.

It will be proper, however, to remark here, that the distinction between a brother of the half blood and one of the whole, is now very justly and happily exploded; so that now a brother of the half blood will be entitled to inherit next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor, where such common ancestor shall be a female. (Stat. 3 & 4 Will. 4, c. 106, s. 9.)

When estates will arise by implication.

An estate may also arise by implication, by reason of words of direct and immediate reference to other devises in the same will.

Wight *v.* Cundall.

Thus in *Doe dem. Wight* v. *Cundall* (9 East, 400) a testator devised thus:—"I give and bequeath unto the two children, Elizabeth and Jemima, daughters of my brother, William Wight, deceased, the first four freehold houses next my dwelling, built by me in 1770, when they have attained the age of twenty-one years; but the executor or executrix shall be accountable for the profits of the said houses until the said children attain the aforesaid age of twenty-one, or day of marriage; but if either of them should die before the age of twenty-one years, then the survivor shall be heir to the other two houses. Likewise I give and bequeath to the two children, Robert and Rebecca, son and daughter of my late brother Robert, deceased, the next four houses adjoining the same, on the same conditions as my brother William Wight's children." It was held that the fee passed, which would go over to the survivor in case one died under twenty-one, and would descend or be disposable if he died attain-

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ing twenty-one ; *and that a devise of the other land to the two children of Robert on the same conditions as his brother William's children, was to receive a similar construction.*

When a reference to a person as heir may create an estate by implication.

So where a testator refers to a particular person as his heir, though mistaken as to the fact, such reference will be sufficient to create an estate by implication to the party referred to, without any words of express devise. As in *Tilley* v. *Collyer* (3 Keb. 589), where a testator, having issue by C. three daughters, S., A., and E., devised to C. for life all his freehold whereever, until S. *his heir* came to twenty-one, paying to the heir 10*s.* during the term, and to the rest, after fifteen years old, 20*s.* apiece, and the heir to pay to A. and E. 100*l.* a-piece, 40*l.* at the decease of the wife, &c. and if S. his heir, died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E. &c. ; Lord C. J. Hale said, that notwithstanding the testator was mistaken in his intent that his eldest daughter was his heir, he intended his lands should go according to that mistake ; therefore, albeit there was no express devise to S. yet she being named his heir was sufficient to exclude the rest and make her sole heir : (See also *Taylor* v. *Webb*, Str. 301.)

When a reference to a disposition, although not made, will raise an estate by implication.

And if a testator should refer to a disposition made by him, when, in fact, he has not made any such disposition at all, a devise may still arise by implication. *Bibin* v. *Walker* (Ambl. 661) is a case of this description. In that case a testator bequeathed one moiety of certain leasehold estates to E. G. and if she should die before twenty-one, to G. S. ; and, if he should die before a certain event, to another person, and after her death, to A. ; and provided, that in case A. should die without issue, and E. G. or G. S. should be then living, or either of them, the said moiety of his leasehold messuages before given to the said A., should go to E. G. and G. S. : Sir T. Sewell, M. R. said,

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that as there could be no doubt of the intention, and the words of gift being omitted by mistake, the court would supply them, and would imply a gift to A. and her issue, with contingent limitations over. But, generally speaking, a mere recital to give, without more, will not amount to a gift or demonstration of an intent to give. Thus, where B. by his will, reciting that he was entitled for life under the will of A. to the advowson and rectory of D. with remainders over, "subject to a direction in the said will that my brother J. D. shall be presented to the said rectory when it shall next become vacant, which it is my wish may be complied with; now I hereby declare it to be my desire and earnest wish, that in case, upon the vacancy of the said living, the said J. D. shall not be then living, or in case the said rectory shall again become vacant, after the said J. D. shall have been presented to and accepted said presentation, then" A. P. was to be presented. The fact was, that under the will of A., J. D. was only entitled to the presentation on a contingency which had not happened. A question then arose, whether the expressions in the will of B. raised a gift by implication so as to put the persons actually entitled under it to their election; and Lord Eldon, upon the grounds above alluded to, decided that they did not.

Mere recital to give incapable of creating such gift by implication.

In order to effectuate the intention of the testator, the same words, when applied to different kinds of property, may receive a different construction with respect to the one from what they would when applied to the other. Hence, a limitation in the same terms which when applied to freehold property would have been considered to imply an indefinite failure of issue, when applying to leaseholds has been construed to mean a dying without issue at the death of the first taker. The reason for adopting this

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construction is to give effect to the limitation over, which could not take effect in the case of leasehold property if the limitation over were only to take effect on an indefinite failure of issue in the first taker; for that would have been sufficient to confer an estate tail upon him in the case of freeholds, and would thus have brought the limitation within the long-established rule that where personal estate is bequeathed in terms that would have passed an estate tail in freehold property, it will pass the absolute interest in leaseholds; the consequence of which would be, that all the ulterior limitations would be void. In order, therefore, to support these latter interests, the courts have adopted the principle above laid down.

Forth v. Chapman.

The authority which best illustrates this doctrine is *Forth* v. *Chapman* (1 P. Wms. 663).

In that case, a testator being possessed of freehold and leasehold property, devised the residue of his real and personal estate to his nephews W. and G., and if either of them should depart this life and leave no issue of their respective bodies, then he gave the said premises to D. Lord Parker here observing that the devise carried a freehold as well as a leasehold interest, nevertheless thought it might be reasonable enough to take the same words in different senses as to the two different estates; and that as to the freehold, the construction should be that if W. or G. died without issue generally, and as to the leasehold, the same words might be construed to mean a dying without issue living at the death: (Fearne C. R. 476; *Harris* v. *Lincoln* (*Bishop of*), 2 P. Wms. 140.) But since the statute 1 Vict. c. 26, it seems that the dying without issue would, in a devise subsequent to 1837, be confined to the death of the first taker in the freehold, as well as in the leasehold property (sect. 29); and see *sup.* pp. 315, 319.

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### 4. *Effect of subjecting Lands to a Charge.*

When a charge on real estate will convey the fee.

When lands are devised to a person without words of limitation, charged with the payment of a sum in gross (*Collier's case*, Cro. Eliz. 878 ; *Frank* v. *Lee*, 2 Show. 38 ; *Read* v. *Hatton*, 2 Mod. 25) ; or of debts and legacies (*Doe dem. Palmer* v. *Richards*, 3 T. R. 356 ; *Doe dem. Whilley* v. *Holmes*, 8 T. R. 1) ; or of an annual sum (*Webb* v. *Hearing*, Cro. Jac. 114 ; *Spicer* v. *Spicer*, ib. 527 ; *Read* v. *Halton*, 2 Mod. 25 ; *Smith* v. *Tendall*, 2 Salk. 685 ; *Jenkins* v. *Jenkins*, Willes, 635 ; *Badeley* v. *Leapingwell*, 3 Bur. 1533 ; *Goodright dem. Baker* v. *Stocker*, 5 T. R. 13 ; *Andrew Southhouse*, ib. 292 ; *Frogmorton* v. *Holliday*, 3 Bur. 1618) ; or the devisee is to give, or relinquish a benefit, or to release a debt, or to buy an estate for another, he will take an estate in fee simple (2 Rep. 21 ; 6 Rep. 16 ; 1 Roll. Abr. 834 ; *Green* v. *Armstead*, Hob. 65) ; and it will make no difference whether the charge amounts to the annual rent or value of the land or not (*Webb* v. *Hearing*, Cro. Jac. 415 ; *Smith* v. *Tendall*, 2 Salk. 685) ; or the payment is only to continue during the life of another (*Jenkins* v. *Jenkins*, Willes, 635 ; *Badeley* v. *Leapingwell*, 3 Bur. 1533 ; *Goodright dem. Baker* v. *Stocker*, 5 T. R. 12 ; *Frogmorton* v. *Holliday*, 3 Bur. 1618) ; for the devise will be intended to have been designed for the benefit of the devisee ; and if he had an estate for life only, he might die before he received the amount of the charges, and consequently might be a loser.

When a charge on real estate will not carry the fee.

But where the devisee was only to pay out of the rents and profits generally, or when, or as, or after they were received, it was considered unnecessary to extend the intention of the testator beyond the words of the will ; consequently, he would have taken no

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more than a life estate; and the construction was the same where he was not to take until after the charges were satisfied: (*Dickens* v. *Marshall*, Cro. Eliz. 330; *Deacon* v. *Marsh*, Moor. 594; *Fairfax* v. *Heron*, Pre. Cha. 67; *Canning* v. *Canning*, Mos. 240; *Merson* v. *Blackmore*, 2 Atk. 341; *Denn dem. Moor* v. *Mellor*, 5 T. R. 558; *Doe dem. Small* v. *Allen*, 8 T. R. 497; *Doe dem. Bowes* v. *Blockett*, Cow. 235; *Doe dem. Briscoe* v. *Clark*, 2 Bos. & Pull. N. R. 343; *Goodtitle dem. Paddy* v. *Maddern*, 4 East, 496; *Doe dem. Jackson* v. *Ramsbottom*, 3 Mau. & Selw. 516.) And if the charge is in a distinct clause, without any direction, either expressly, or by construction, that the devisee is personally liable, a devise in fee would not be implied from such a charge. As, where a devise was to A. and B., except 20*l.* to be paid out of E.'s part of the lands, it was held to pass an estate for life only; this being no charge on the estate in the hands of the devisee, but a charge antecedent to it: (*Roe* v. *Dow*, 3 Mau. & Selw. 518; see also *Doe dem. Briscoe and Wife* v. *Clark*, 2 Bos. & Pull. N. R. 343; *Compton* v. *Compton*, 9 East, 267.) And even where there is a personal charge on the devisee, a testator may nevertheless restrict the interest to a lesser estate than a fee, as by limiting his estate expressly for life, or in tail; and even a devise to a man, his heirs and assigns, subject to a charge, may be reduced to an estate tail by a clause which introduces another gift to commence on his death without issue. But this, it seems, it will not do as to wills made after 1837; because, by the express words of the new Will Act (sect. 29), the dying without issue must be construed as dying without issue at the time of the death of the party, which will create an estate in fee, subject to a limitation over by way of executory devise, instead of an estate tail with a remainder

over, which it must have been, had the limitation been construed, as it was formerly, to mean an indefinite purchase of issue in the first taker.

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5. *When a Testator directed an Act to be done which a Life Estate might have proved insufficient to accomplish.*

What acts directed to be done would have passed a fee.

Another ground for holding the fee to pass where no words of limitation are employed, is when a testator directs anything to be done which a mere life estate in the devisee might be insufficient to carry into effect; as a devise for the payment of debts and legacies (*Beezely* v. *Westerhouse*, 4 T. R. 89); or where trusts are to be exercised, in both of which cases the devisees or trustees would be held to take an estate of inheritance (*Shaw* v. *Weigh*, 1 Eq. Ca. Abr. 184; *Bateman* v. *Roach*, 9 Mod. 104; *Villiers* v. *Villiers*, 2 Atk. 71; *Gibson* v. *Montford*, 1 Ves. 485; *Challenger* v. *Sheppard*, 8 T. R. 597), and not an estate merely commensurate with the existence of the purposes of the will, or the objects of the trusts, which in many instances might have been effected by an estate *pur autre vie;* and this construction has been confirmed by the late Will Act (1 Vict. c. 26), by which devises of real estates to trustees or executors, except for a term, or a presentation to a church, without any express limitation of estate, shall be construed to pass the fee, or such other estate or interest as the testator had the power to dispose of by will, and not an estate determinable when the purposes of the trust are satisfied (sects. 30, 31.) Yet where lands are simply directed to be sold, but are not directly devised to be sold by the trustees or executors, an authority only, and no interest, will be held to pass under those terms (9 Edw. 6, b. 25, *a*; Litt. sect. 169; Latch. 43; *Howell* v. *Barnes*,

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Cro. Car. 382 ; *Yates* v. *Compton*, 2 P. Wms. 308 ; *Lancaster* v. *Thornton*, 2 Bur. 1028) ; and, subject to the power of sale, the land would descend upon the heir ; nor does the law in this respect appear to have been altered by the new Will Act, which only mentions, "where any real estate shall be *devised* to any trustee or executor" (sect. 40), or, "where any real estate shall be *deviscd* to any trustee," &c. (sect. 31.)

### 6. *Effect of a Devise in Fee to Trustees upon Trust Estates.*

When the legal fee passes, and no restrictive terms are used, *ce-tui que trust* will also take the fee in the trust estate.

When the legal estate is devised to trustees in fee, and there is an apparent intent that all the beneficial interest in the estate should belong to a particular person, or to a particular class of persons (which will generally be inferred when the trust is declared directly in their favour without any restrictive terms), the fee in the trust has been held to pass without any words of limitation : (*Bateman* v. *Roach*, 9 Mod. 104 ; *Newland* v. *Shepherd*, 2 P. Wms. 194 ; S. C. 1 Eq. Ca. Abr. 329 ; *Challenger* v. *Sheppard*, 8 T. R. 597.) So, where there is a trust, or direction to purchase land for another, it will be implied that the purchase is to be in fee simple : (*Green* v. *Armstead*, Hob. 65.)

### 7. *Power of Disposition over the Property.*

Where a power of disposition will pass the fee.

It has also long been a fixed rule of law, that where lands are devised to a man without words of limitation, but conferring on him an absolute power of disposition over the property, he will be construed to take the fee : but the construction will be otherwise where he has an express estate divided from the power. And the like doctrine prevails whenever the power is restricted to a particular mode of disposition, as by deed, or by will, or on the happening of a contingent

event. Yet where an express estate for life is given in order to let in estates to strangers, *and no specific mode is required to the disposition of the inheritance*, then, in the event of mesne estates not taking effect, the devisee will take the entire fee-simple. *Goodtitle* v. *Otway* (2 Wils. 6), is a case of this description. There the devise was to the testator's heir-at-law for her life, and after her death to her lawful issue, and if she should have no issue, she should have power to dispose thereof at her will and pleasure. She died without issue, and the court were clearly of opinion that, as the contingent remainder to the children never vested, she had an estate in fee-simple. (See also *Turner* v. *Hardie*, 1 Leon. 283.)

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But where an estate for life is not expressly given, but the property is devised generally to the devisee to such uses as he shall appoint, nevertheless confining the power of disposition to particular objects, it seems difficult to decide whether the devisee will take a fee-simple conditional, or an estate in fee upon trust, or an estate for life with power to dispose of the inheritance; but the more general opinion appears to be in favour of an estate for life, with a power of appointment over the fee, unless the will should contain sufficient words to negative such a construction.

Where the power of disposition is confined to particular objects.

The foregoing observations, it may be necessary for me again to remind my readers, are applicable only to wills prior to the operation of the late Will Act (1 Vict. c. 26); for as to wills made subsequently to the 1st of January, 1838, no words of limitation will be necessary to pass an absolute estate in fee simple, when the subject-matter of the devise is sufficiently described to identify the property intended to pass by it.

Foregoing observations only applicable to wills made previously to 1st January, 1838.

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Effect of late Will Act with respect to lapse of devises.

As the law stood previously to the recent enactment (1 Vict. c. 26), a devise would have lapsed by the death of the legatee in the testator's lifetime (*Sympson* v. *Hornbsy*, Pre. Ch. 439; *Brett* v. *Rigden*, Plow. 340; *Hartop's case*, Cro. Eliz. 243; *Turner* v. *Kelt*, 4 T. R. 601); and so it will still, unless in the case of estates tail, and gifts to children or other issue of the testator. (See *infra*, p. 333, et seq.)

## SECTION III.

### CONSTRUCTION OF WILLS WITH RESPECT TO TRUSTS AND POWERS FOR SALE.

1. *Where the Property is directed to be sold without saying by what Persons the Sale is to be made.*
2. *Whether an Authority given to several will survive.*
3. *Whether a Power of Sale can be exercised when some of the Donees refuse to concur.*

### 1. *Where the Property is directed to be sold without saying by what Persons the Sale is to be made.*

What persons are to sell when the power of sale is silent upon that point.

It occasionally happens that a testator directs property to be sold for certain purposes, without declaring by what persons such sale is to be effected. Whenever this occurs, if the proceeds of the sale are to be distributable by the personal representatives, as where the purchase-money is to be applied in payment of debts (Ram. on Assets, 106 ; *Anon.* 3 Dy. 371, C. ; *Anon.* 2 Leon. 220 ; *Blatch* v. *Wilder*, 1 Atk. 420) ; or debts and legacies (*Anon.* 2 Leon. 220 ; *Hughes* v. *Collis*, 1 Ch. Cas. 179) ; or legacies only (*Anon.* Dalison, 106, ca. 56 ; *Carvill* v. *Carvill*, 2 Ch. Rep. 302); or by the terms of the will are to be confounded with the testator's personal property, and with it to form one fund for the payment of

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the legacies (*Tilden* v. *Hyde*, 2 Sim. & Stu. 238), then a power of sale will arise by implication in the executors, which power will be transmissible from them to their personal representatives. But no such implication will arise where the proceeds of the sale are not to be applied by the executors in the execution of their office. Hence, if a testator simply bequeaths the money to arise from the sale to certain persons named, this bequest does not cause the money to be applicable by the executors in the execution of their office, and, therefore, in this case, they are not, but the heir-at-law of the testator is, the party to sell and convey to the purchaser : (Ram. on Assets, 105 ; *Bentham* v. *Wilshire*, 4 Mad. 44 ; *Patton* v. *Randall*, 1 Jac. & Walk. 189.)

When a power of sale will arise by implication.

When equity will enforce the trust of a power that cannot be exercised at law.

But in any of the cases which have been alluded to, notwithstanding the power cannot be exercised at law, yet, certainly, a court of equity will, while the trust implied in it exists, enforce the execution of the trusts, by decreeing a sale pursuant to the testator's intention : (Ram. on Assets, 101, referring to *Gwilliams* v. *Rowell*, Hard. 204 ; *Garfoot* v. *Garfoot*, 1 Ch. Cas. 35 ; *Ashby* v. *Doyl*, ib. 180 ; *Amby* v. *Gower*, 1 Ch. Cas. 283 ; S. C. 1 Lev. 304 ; *Locton* v. *Locton*, 2 Freem. 136 ; *Yates* v. *Compton*, 2 P. Wms. 308 ; *Witchcot* v. *Louch*, Ch. Rep. 183.)

Powers in the nature of a trust.

Powers of this kind are defined to be powers in the nature of a trust, which differ from ordinary powers, because powers strictly as such are never imperative, but leave the act to be done at the will of the party to whom they are given (Wilm. 23) ; whereas trusts are always obligatory upon the conscience of the party entrusted. But in cases like those last alluded to, the trusts and powers are blended together. Until the power be exercised, the estate descends on the heir (*Warneford* v. *Thompson*, 3 Ves. 513 ; *Hilton* v. *Kenworthy*,

3 East, 553), who (if such power were extinguished by the death of parties to whom it was given without having executed it, or never arose on account of the testator not having appointed any person to execute it), would at law be entitled to hold it for his own benefit ; but here equity acting upon the trust, will compel the heir to concur in the sale, in order to carry out the purposes of the will : (*Hyer* v. *Wordale*, 2 Freem. 135, cited ; *Locton* v. *Locton*, 2 Freem. 136 ; *Pitt* v. *Pelham*, 1 Ch. Cas. 176.)

### 2. *Whether an Authority given to several will survive.*

As to the survivorship of powers of sale.

When property is devised to be sold by executors, so that a mere authority, and no estate passes to them, questions sometimes arise as to whether, in case any of them die, the power can be exercised by the survivors. This it seems it cannot be where the authority is given to them by name ; as where a testator directs that his executors, A. B. and C. shall sell the land : (Co. Litt. 113; *Peyton* v. *Bury*, 2 P. Wms. 626 ; *Attorney-General* v. *Gleg*, 1 Atk. 356.) But when the direction is that the estate shall be sold by the executors generally, then, if there be three or more, and one or two die, provided a plurality of executors still remain so as to satisfy the description, the power will still survive even at law (Co. Litt. 3, *a* ; *Vincent* v. *Lee*, Co. Litt. 113, *a* ; Dy. 117, pl. 32; *Garbrand* v. *Mayot*, 2 Vern. 105); but it seems at least doubtful whether it would where only one survives ; for then the description of executors is no longer applicable (Dy. 219, side note, pl. 8) ; and although cases are not wanting to support the validity of the exercise of a power given to executors by a single survivor (*Howell* v. *Barnes*, 3 Cro. Car.; S. C. *nom. Barnes's case*, W. Jones, 352, pl. 2 ;

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*Anon.* 2 Leon. 220; *Milward* v. *Moore*, Sav. 72; *Anon.* Dy. 371, 6, pl. 3), still no purchaser would be warranted in accepting a simple conveyance from the surviving executor. In the case of trustees a still stricter rule prevails against the power surviving; which, unless directed to be exercised by the survivors, it seems it will not do where the instrument contains a power to appoint new trustees, notwithstanding the proceeds of the sale may be directed to be paid to the trustees or to the survivor of them, his executors or administrators (*Townsend* v. *Wilson*, 1 B. & Ald. 608; see also *Hall* v. *Dewes*, 1 Jac. 189; *Bradford* v. *Belfield*, 2 Sim. 264.)

### 3. *Whether a Power of Sale can be exercised when some of the Donees refuse to concur.*

Whether power given to several may be executed by some when the rest refuse.

Renunciation of executorship will not preclude executors from selling lands under a power of sale conferred upon them by the will.

Formerly, where a power was given to executors to sell, and one of them refused the trust, the others could not sell. But the statute 21 Hen. 8, c. 4, provided, that where lands were willed to be sold by executors, and part of them refuse to be executors and to accept the administration of the will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined. It must also be kept in mind that executors are not disqualified from exercising a power of sale contained in a will, by renouncing the probate of the will and the office of executorship: (*Yates* v. *Compton*, 2 P. Wms. 308; *Denne* v. *Judge*, 11 East, 288.)

## SECTION IV.

### OF ESTATES TAIL.

1. *Of the Enactments of stat.* 1 *Vict. c.* 26, *respecting Estates Tail.*
2. *Of the Rule in Shelley's case.*
3. *Application of the Rule as to Equitable Estates.*
4. *Of the Cy. Pres. Doctrine.*
5. *Application of the Rule in Shelley's case to Copyholds.*
6. *As to Estates for Years.*
7. *What Terms will supply the place of regular Words of Limitation.*
8. *When an Estate Tail will arise by Implication.*
9. *Cross Remainders.*

### 1. *Of the Enactments of stat.* 1 *Vict. c.* 26, *respecting Estates Tail.*

Devises in tail will not lapse by death of tenant in tail in testator's lifetime leaving issue inheritable under such entail.

WITH respect to estates tail, it is enacted by the 32nd section of the new Will Act (1 Vict. c. 26), "that where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue, who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall

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take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

As to gift to children or other issue.

With respect to gifts to children or other issue of the testator, the 33rd section enacts, "that where any child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any issue of such shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator." But this section of the statute, it has been determined, does not substitute the issue for the pre-deceased devisee, but the latter will take a fee-simple conditional, depending either on his surviving the testator, or on his leaving issue living at the time of such testator's death; and the devisee may dispose of such interest by his will, notwithstanding he should die in the testator's lifetime: (*Johnson* v. *Johnson*, 3 Hare, 157.) Nor does the enactment, that a bequest to a child who died in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, apply to a testamentary appointment: (*Griffith* v. *Gale*, 12 Sim. 327.)

### 2. *Of the Rule in Shelley's case.*

Shelley's case.

It may not be improper in this place to give a brief outline of the rule in *Shelley's case;* but which, though so thus designated, was a fixed rule of law long before that case was decided, in which it was not a subject for the determination of the court, or even of controversy, but is expressed in the arguments in clear terms as

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an acknowledged rule of law, and from thence it is presumed to have received this appellation.

When the rule will apply.

By this rule, whenever an estate is given to one generally, or for life, and afterwards, in the same instrument, a remainder is limited to his heirs, or the heirs of his body, such subsequent limitation vests immediately in the ancestor, and will not remain in contingency or abeyance. If the limitation be to his heirs, he will take an estate in fee-simple; if to the heirs of his body, an estate tail. This rule will apply equally, notwithstanding an intervening estate for life or in tail be interposed between the freehold of the ancestor and the subsequent limitation to his heirs: with this diversity, that where the devise is immediate, as to A. for life, remainder to his heirs, or the heirs of his body, it becomes executed in the ancestor, forming, by its union with his particular estate, one estate of inheritance in possession; and where it is mediate, as to A. for life, remainder to B. for life, or in tail, remainder to the heirs, or the heirs of the body of A., it is then a vested remainder in the ancestor, not to be executed in possession till the determination of the preceding mesne estates: (*Hodgson* v. *Ambrose*, Doug. 337, 345; S. C. Dom. Proc. 3 Bro. P. C. edit. Toml. 416.) And notwithstanding the estate be limited to the ancestor expressly for his life) *Rundall* v. *Eiley*, Carth. 170; *Goodright* v. *Pullen*, Lord Raym. 1437); or it is declared to be without impeachment of waste (a restriction inconsistent with an estate of inheritance) (*Papillon* v. *Voice*, 2 P. Wms. 471; *Robinson* v. *Robinson*, 2 Ves. sen. 225; *Denn dem. Webb* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 548; *Jones* v. *Morgan*, 1 Bro. C. C. 206; *Bennett* v. *Tankerville* (*Earl of*), 19 Ves. 170; *Perrin* v. *Blake*, 4 Bur. 2570; 1 W. Blackst. 672); or trustees are interposed

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to preserve contingent remainders (*Colson* v. *Colson*, 2 Atk. 247; S. C. 2 Str. 1125; *Hodgson* v. *Ambrose*, Doug. 337, 345; S. C. 3 Bro. P. C. edit. Toml. 416; *Sayer* v. *Masterman*, Ambl. 344; *Measure* v. *Gee*, 5 B. & Ald. 910); or the estate of freehold is limited to the separate use of the devisee (*a fême covert*) (*Lord Say and Sele*, 8 Vin. Abr. 262, pl. 19; S. C. in Dom. Proc. 3 Bro. P. C. edit. Toml. 458; *Douglas* v. *Congreve*, 1 Beav. 59); or a power of jointuring is given to the first devisee (*King* v. *Melling*, 2 Lev. 58; S. C. 3 Keb. 42); or the testator even proceeds to impose a restriction against alienation (*Perrin* v. *Blake*, 4 Bur. 2579; 1 W. Blackst. 672; *Hayes dem. Foorde* v. *Foorde*, 2 W. Blackst. 698); or there is an express direction that the ancestor shall take for life only (*Thong* v. *Bedford*, 1 Bro. C. C. 313); the rule will nevertheless apply, and in every instance vest the inheritance in the first taker. Neither will the application of the rule be prevented by words of superadded limitation being engrafted on the devise to the heirs. As, for example, a limitation to A. for life, and the heirs male of his body, and the heirs male of the body of such heirs male.

Words of superadded limitation engrafted on the limitation to the heirs will not prevent the application of the rule.

*Shelley's case* itself is, indeed, the leading authority in support of the latter construction in the case of a deed; and *Goodright* v. *Pullen* (Lord Raym. 1437) is an instance of the same doctrine applied to wills: (see also *Hayes dem. Foorde* v. *Foorde*, 2 W. Blackst. 698; *Denn and Gearing* v. *Shenton*, Com. 410; *Wright* v. *Pearson*, Ambl. 358; *Minshull* v. *Minshull*, 1 Atk. 411.) Nor will a devise to the heir in the singular number (*Burley's case*, cited by Hale, C. J. Ventr. 230; *Whiting* v. *Wilkins*, Bulstr. 219; *Pausy* v. *Lowdall*, 2 Roll. Abr. 794; *Miller* v. *Seagrove*, Rob. Gav. 96; *Dubber* v. *Trollope*, Ambl. 453), (*provided no words of*

*limitation* are superadded or engrafted on it), (*a*) prevent the application of the rule; although in the case of a deed the construction would be otherwise; for in the latter instance the ancestor would take a mere life estate, with remainder to the heir as a purchaser.

The particular estate being determinable on contingency will not prevent the application of the rule.

The rule will also apply, notwithstanding the particular estate of freehold be determinable on an event which may happen in the lifetime of the first taker (*Merrill* v. *Rumsey*, 1 Keb. 888; S. C. Sid. 427; 4 Bac. Abr. 601); as where the particular estate of freehold is limited during widowhood, or the life of another person (*Curtis* v. *Price*, 12 Ves. 89); nor will it make any difference although the ancestor himself must die before the object of the gift to the heirs can be ascertained: as to two persons as long as they jointly live, with remainder to the heirs of him that dies first (10 Rep. 30; 1 Roll. Abr. 839; *Highway* v. *Banner*, 1 Bro. C. C. 584); or the limitation to the heirs is on a contingency that may or may not happen; as for example, a gift to A. for life, and if she marries and has heirs of her body, then the heirs to have the lands. Neither is it of any consequence whether the estate of freehold is in the ancestor by express limitation or by implication (*Hayes dem. Foorde* v. *Foorde*, W. Blackst. 658), or results to him (*Pibus* v. *Mitford*, Ventr. 272; *Wills* v. *Palmer*, 5 Bur. 2615), as in either case the construction will be the same; for if the intention is once clear that the succession shall go and be confined to the heirs of the tenant for life, the notion that they shall take by purchase must be rejected for inconsistency; as all persons claiming in the

(*a*) That the rule will not apply when words of limitation are engrafted on a devise to the *heir* in the singular number, see *Archer's case* (1 Rep. 66); *Clark* v. *Clark*, or *Clark* v. *Day* or *Davy* (Moor. 593; Cro. Eliz. 313); *White* v. *Collins* (Com. 289).

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*Rule in Shelley's case.*

character of heirs must take in that quality by descent, and not by purchase.

Requisites to the application of the rule in Shelley's case.

But in order that the rule may apply, it will be requisite, 1. That an estate of freehold be limited to the ancestor. 2. There must be a limitation to the heirs, or heirs of the body of the ancestor, in those terms, or by some equivalent substituted name; as issue for instance; and not the heirs as meaning or explained to be sons or children, or the like. 3. The heirs must take as the heirs of the ancestor to whom the freehold is devised, and not of him and another person. 4. Both limitations must give estates of the same quality. 5. Both limitations must be by the same instrument.

An estate of freehold must be limited to the ancestor.

1. *An estate of freehold must be limited to the ancestor.*—In order that the rule in *Shelley's case* may apply, it is absolutely necessary that the ancestor should take an estate of freehold, either by express words or by implication; for if he takes no such estate, or merely a term of years, with remainder to his heirs, &c. the two estates will not unite in the ancestor, but will go to the heirs as purchasers: (*Roe dem. Nightingale* v. *Quartley*, 1 T. R. 630; *Harris* v. *Barnes*, 1 W. Blackst. 643.) It may be proper, however, to remark that, although the heirs, thus taken as purchasers, will not derive their estate through their ancestor, they will so far take with reference to him as to pursue the same course of succession as if it attached and descended from him: (Fearne Cont. Rem. 80.) An acquisition of this kind is styled an acquisition *per formam doni*, not being strictly a descent, because the estate never attached, or could by possibility attach, or be derived through him; and yet not operating as a purchase, because the estate goes in the same course of succession as it would have done under a descent, exclusive of persons to whom it would have gone if the heirs had taken absolutely by

purchase. Thus a limitation to the heirs male of the body of B., where no estate is given to B. himself, though it originally attaches in his heirs male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate tail male, without any express words of limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B., in the same course as if the estate had descended from B. himself: (*Mandeville's case*, Co. Litt. 266; *Southcott* v. *Stowell*, 1 Mod. 226; *Wills* v. *Palmer*, 5 Burr. 2615.)

The limitation must be to the heirs of the person taking the preceding estate of freehold.

2. *There must be a limitation to the heirs, &c. of the person taking the previous estate of freehold by that or some equivalent substituted name, as issue for instance; and not the heirs as meaning or explained to be sons, or children, or the like.* —When it appears from the general context of the will the testator did not mean to employ the word "heirs" according to its strict technical import, that intention must be allowed to prevail, notwithstanding he has used such technical words in other parts of his will. Hence, although a testator should devise to B. and the heirs of his body, he will not be precluded from explaining by subsequent words in what sense he intended the words "heirs of the body" to be taken; if, therefore, to the limitation to the heirs of the body he were to add "that is to say, his first, second, third, and every son and sons successively," &c., the subsequent clause would not be considered as contrary to the preceding general limitation to B.'s heirs lawfully to be begotten, but explanatory of what heirs, &c. were meant; consequently the rule would not apply, and B. would take a mere estate for life: (*Lisle* v. *Gray*, 2 Lev. 223; *Lowe* v. *Davis*, 2 Lord

Raym. 1561; *Mandeville* v. *Lackey*, 3 Ridg. P. C. 352; *Grethon* v. *Haward*, 6 Taunt. 94; *Goodtitle dem. Sweet* v. *Herring*, 1 East, 264; *Shortridge* v. *Creber*, 5 B. & C. 866; *Doe dem. Woodhall* v. *Woodhall*, 7 L. T. 322.)

Whether words of engrafted limitation will prevent the application of the rule.

It has been said that although words of engrafted limitation annexed to the limitation to the heirs will not prevent the application of the rule, yet that will be otherwise if by such engrafted words the course of descent be altered. This doctrine appears to be founded entirely upon the supposed case put by Anderson, J. in *Shelley's case*, where he says, that if the words of engrafted limitation describe an estate descendible in a different course and to different persons, as to special heirs, from what the first would carry the estate to, viz., to females instead of males, or *vice versâ*, it will prevent the application of the rule, for in such case the general effect of the first word, "heirs," is abridged and qualified by such subsequent express words of limitation, as cannot possibly be satisfied by considering the first words as words of purchase. This point does not, however, appear to have been as yet judicially decided; whilst, on the other hand, it has been determined, over and over again, that notwithstanding the words of distribution are annexed to the limitation to the heirs of the body, which, if literally carried into effect, would create an estate descendible in a different manner, they will be insufficient to control the legal import of preceding words sufficient to create an estate tail, as, for example, a limitation to A. for life, with remainder to the heirs of his body as tenants in common, and not as joint tenants: (*Doe dem. Chandler* v. *Smith*, 7 T. R. 531; *Pierson* v. *Vickers*, 5 East, 548; *Doe dem. Cole* v. *Goldsmith*, 7 Taunt. 209; S. C. 2 Marsh. 517; *Ben-*

*nett* v. *Tankerville* (*Earl of*), 19 Ves. 170; *Jesson* v. *Wright*, 2 Bligh, 58; *Doe dem. Bosnall* v. *Harvey*, 4 B. & C. 610.)

The heir must take as heir of the ancestor only.

3. *The heirs must take as heirs of the ancestor, and not of him and another person.*— It is essential to the application of the rule in *Shelley's case* that the heirs should be the heirs of the person taking the estate of freehold, and not of him and any other person. Thus in *Gossage* v. *Taylor* (Yelv. 131; S. C. Sty. 325), an estate was limited to the wife for life, remainder to the heirs to be begotten upon the body of the wife by the husband, no estate being previously limited to the husband; and it was held that the heirs took as purchasers: (see also *Lane* v. *Pannell*, 1 Roll. Rep. 238, 438; *Frogmorton dem. Robinson* v. *Wharry*, 2 Blackst. Rep. 728; S. C. 3 Wils. 144.) But if the devise had been to the wife for life, and the heirs *of* the husband *on* her body to be begotten, she would have taken no more than a life estate. For there is a fixed distinction between the terms "heirs *of* the body," and "heirs *on* the body;" the word "*of*" making the "heirs," &c. words of limitation; the word "*on*" converting them into words of purchase. And however light and frivolous this distinction may now appear, yet it having originally, upon principles now obsolete, obtained ground in judicial decisions, the courts hold themselves bound to observe it: (Fearne C. R. 39; Litt. 26, 27, 28, 29; see Harg. note to 3 Co. Litt. 26, *b.*) At a cursory glance, indeed, *Gossage* v. *Taylor*, above referred to, may seem to militate against this doctrine, for there, as we have already seen, the remainder was to the "heirs to be begotten upon the body of the wife *by* the husband," but the word "*of*" was there omitted altogether, and consequently not applicable to the heirs of either of their bodies; the heirs, in fact, were not required to be of either of their bodies, and were therefore construed as if they

were to issue from both; which construction has been since recognized and adopted: (*Denn dem. Trickett* v. *Gillott*, 2 T. R. 431.) It must also be kept in mind, that although to come within the operation of the rule in *Shelley's case*, the heirs must take as the heirs of the ancestor, and not of him and any other person; still this doctrine will not apply unless the parties from whose bodies the heirs are to issue are married to each other, or may lawfully intermarry; for if they are both of the same sex, or by reason of proximity of kindred or affinity are disabled from lawfully intermarrying with each other, as in such case it would be impossible they could have common heirs of their two bodies, a limitation in these terms would, under the latter circumstances, be construed, as to one moiety, to give the inheritance to the ancestor, and an estate for life in the other moiety, with a contingent remainder, to the person who has not any previous estate of freehold: (*Huntley's case*, Dy. 326; Bendl. 226; 1 Inst. 25; 2 Prest. Estates, 425.) This last proposition, however, supposes that the persons forbidden to marry by reason of consanguinity or affinity have not intermarried with each other; for, if they have done so, notwithstanding their marriage may be annulled by suit in the Ecclesiastical Court; yet, until so avoided, all the consequences of a legal marriage attach; and should they either of them die before the sentence declaring the marriage to be void shall be pronounced, the issue of the marriage will be capable of inheriting: (2 Prest. Estates, 433; 1 Thom. Co. Litt. 126.) As long, therefore, as the marriage continues, a limitation to them would, it is apprehended, have the same operation as if applicable to parties against whose marriage there was no legal impediment.

Both limitations must give estates of the same quality.

4. *Both limitations must give estates of the same quality.*—Both limitations must give estates of the same quality; that is to say, the two estates must

be either legal or equitable: (*Jones* v. *Say and Sele* (*Lord*), 8 Vin. Abr. 262, pl. 19; S. C. 1 Eq. Ca. Abr. 383; 3 Bro. P. C. edit. Toml. 458; *Tippin* v. *Cosin*, Carth. 272; *Heny* v. *Purcell*, 2 W. Blackst. 1002; *Shaplund* v. *Smith*, 1 Bro. C. C. 75; *Silvester dem. Law* v. *Wilson*, 2 T. R. 444; *Venables* v. *Morris*, 7 T. R. 342, 438; *Doe dem. Hallen* v. *Ironmonger*, 3 East, 533; *Curtis* v. *Price*, 12 Ves. 89.) Mr. Fearne, indeed, has carried this doctrine still further, for he expresses an opinion (Fearne C. R. 35) that the rule has not any application in those instances in which the ancestor has the freehold as a trustee, and taking no beneficial interest. Mr. Butler, however, in his valuable edition of Mr. Fearne's Contingent Remainders, very justly remarks (p. 45, n. *p*) that, "as courts of law cannot take notice of any trusts charged on legal estates, the trusts or purposes for which the ancestor's estate of freehold, in the cases proposed by him, is charged, cannot be a subject of their consideration. Courts of law, therefore," he adds, "must treat the case merely as a limitation of a legal freehold to the ancestor, and a limitation of the legal fee to the heirs of his body, and of course hold it to be a legal estate under the rule in *Shelley's case*." Mr. Preston, also, in his elaborate observations on the rule in *Shelley's case*, expresses a similar opinion: (see 2 Prest. Estates, 311.)

The ancestor must take the freehold under the same instrument which contains the limitation to the heirs.

5. *Both limitations must be by the same instrument.*—Both limitations must be by the same instrument; or, in other words, the ancestor must take an estate of freehold under the same instrument which contains the limitation to his heirs. Hence, if A. be tenant for life under a deed, and the lands of which he is so tenant for life be granted by another deed, or devised by will, to the heirs or the heirs of his body, the two estates will not unite and vest the inheritance in him: (*Moore* v. *Parker*, 1 Lord Raym. 37; *Snowe* v. *Cutler*,

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*Of estates tail.*

1 Lev. 135; *Doe dem. Fonnereau* v. *Fonnereau*, Doug. 487.) But a schedule, or a codicil annexed to or referring to a will in which an estate is limited to the ancestor, being considered to form a part of the will itself, does not prevent the application of the rule; notwithstanding the limitation to the ancestor should be in one paper, and the limitation to the heirs should be contained in another: (*Hayes dem. Foorde* v. *Foorde*, 2 W. Blackst. 693.)

As to instruments creating and executing powers.

Whether, when an estate is limited to a man by one instrument, and afterwards to his heirs, &c., in his lifetime under an execution of a power of appointment contained in such first instrument, the two limitations would unite, so as to vest the inheritance in the ancestor, seems, for a considerable time, to have been open to doubt; and, although the prevailing opinion of those best calculated to form one upon so important a subject, seems to have been in favour of the application of the rule (see Fearne C. R. 75), no judicial decision appears to have been ever delivered on the point, until the question again arose in the case of *Venables* v. *Morris* (7 T. R. 342, 438). The nearest case in the old books is *Pybus* v. *Mitford* (1 Ventr. 372), where a limitation to the heirs of the body of A. was held to unite with an estate for life, which resulted to him by the same deed. In *Venables* v. *Morris* (*ubi sup.*), however, the precise question arose. In that case, under a settlement, the husband was tenant for life, remainder to trustees, to preserve, &c. (after several uses which never arose) to such uses as the wife should appoint. She appointed to the right heirs of the husband. The court ultimately held that the fee-simple vested in the trustees, so that the estate under the power being merely equitable, could not unite with the limitation to the husband for life in the deed, which was a legal estate; but Lord

Kenyon treated it as quite clear that the appointment was to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created; and he therefore held, that if the limitation to the heirs of the husband had been a legal estate, it would have enlarged the estate of the ancestor, and have given him a fee.

### 3. *Application of the Rule as to Equitable Estates.*

As to equitable estates.

The rule in *Shelley's case* will comprehend equitable as well as legal estates; that is, provided both estates are equitable; but, with this exception, however, viz., that where the trusts are only executory, courts of equity, in order to effectuate the testator's intention, in framing the settlement of which the will is directory, more according to the spirit and intention than the strict letter of the will, have so far departed from what would be the legal operation of the words limiting the trust, if reduced to a common-law conveyance, as sometimes to construe the words "heirs of the body" into words of purchase, and not of limitation. As, therefore, questions occasionally arise upon this subject, it may not be improper to define the distinction between trusts executed and executory trusts; which seems to be as follows; *e.g.*, when the trusts are wholly and directly declared: as if lands are limited to the use of trustees in trust for B., and after his decease in trust for the heirs of his body, such trusts being wholly declared will be executed in B., and the courts will not, in that case, depart from the general rule of construction to effectuate the presumable purposes of a settlement, contravening the effect of the previous limitations. But where the trusts are only directory, and prescribing the intended

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limitations of some future settlement, they will be considered as executory. Thus, where trustees are directed to purchase or convey lands, the directions are not considered as complete and conclusive, but rather as minutes from which more full and correct limitations are to be framed; and in such case the court, in decreeing such settlement, will depart from the strict technical words, in order the better to effectuate the general objects which the testator had in view. Hence a clause exempting the ancestor from impeachment of waste (*Papillon* v. *Voice*, 2 P. Wms. 471; *Glenorchy* (*Lord*) v. *Bosville*, Ca. temp. Talb. 3; *Ashton* v. *Ashton*, 1 Coll. Jur. 525); the insertion of trustees to support contingent remainders (*Papillon* v. *Voice, sup.*; *Earl of Stamford* v. *Hobart*, 3 Bro. P. C. edit. Toml. 31; *Horne* v. *Barton*, Coop. 257); or any other clause which denies the power of barring the entail (*Leonard* v. *Sussex*, 2 Vern. 525), furnishes evidence of such intention; in which case the courts, in directing a conveyance, will order a strict settlement, and by that means confine the estate of the first taker to a mere life interest, notwithstanding the words of limitation to his heirs, &c., would have been sufficient to have vested the inheritance in him in the case of a legal estate, or a trust executed. But even in the instance of executory trusts, there must be some expression in the will besides the mere limitation to the ancestor for life, to enable the court to discover that the testator meant his heirs should not take in that right, and under the strict technical import of that term; for the courts must necessarily follow the testator's words, unless he has shown that he did not mean to use them in their proper sense, and have never gone so far as to say that merely because the direction was for an entail, they would execute that by decreeing a strict settlement. It must also be kept in mind that, in order to enable the Court

of Chancery to interfere in directing the mode in which the trust is to be performed, it must appear in express terms that the trustees are to settle, convey, &c.; for a mere direction to purchase has been holden to be insufficient: (*Seale* v. *Seale*, Pre. Cha. 421; S. C. 1 P. Wms. 290; *Austen* v. *Taylor*, Ambl. 376; *Blackburn* v. *Stables*, 2 Ves. & Bea. 367.)

### 4. *Of the Cy. Pres. Doctrine.*

Observations upon the cy. pres. doctrine.

And as, on the one hand, courts of equity, in order to effectuate the testator's intention, have restricted a limitation in terms sufficient to pass the inheritance to a mere life estate, so, on the other, they have for the same cause extended a limitation which in express terms would only have passed a life estate, to an estate of inheritance, in order to embrace more remote objects of the testator's bounty, whom, from the general tenor of the will, it is evident he intended should take, but the language employed by him has been such, as if construed literally, would be contrary to law, in consequence of being limited to take effect on a contingency that must not necessarily happen within the limits prescribed for the vesting of an executory devise; as where a devise is made to the issue of persons unborn as purchasers. In cases of this kind, therefore, where the intent has been manifest, the courts, rather than the intention should altogether fail, have so construed the devise as to vest the estate in the possible ancestor, and thus, in the nearest practicable way, bring all the parties intended to be benefited within the scope and operation of the will; and hence it is that this construction is called the *cy. pres.* doctrine—a doctrine only allowed in the case of wills (*Brudenell* v. *Elwes*, 7 Ves. 390), and applicable only to real estate (*Routlege* v.

*Dorrill*, 2 Ves. 357), or money directed to be laid out in lands, which in the eye of a court of equity is transmissible in the same manner as the purchased property itself would have been, and has all the incidents of real estate: (*Pembroke* (*Earl of*) v. *Bowden*, 3 Cha. Rep. 115; S. C. 2 Vern. 583; *Otway* v. *Hudson*, *ib.* 583; *Allen* v. *Allen*, Mosel. 123; *Chaplin* v. *Chaplin*, 3 P. Wms. 229; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Lechmere* v. *Carlisle* (*Earl of*), 3 P. Wms. 211; *Lingen* v. *Sowray*, 1 Eq. Ca. Abr. 175; S. C. 3 P. Wms. 221; *Crabtree* v. *Bramble*, 3 Atk. 680, 687; *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; *Broome* v. *Monck*, 10 Ves. 597; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.) The case of *Humberston* v. *Humberston* (1 P. Wms. 332) has generally been considered as the leading authority in support of the *cy. pres.* doctrine. In that case lands were devised to trustees in trust to convey the premises to Matthew Humberston for life, and upon his death to his first son for life, and so to the son of that first son for life, &c.; and if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son; and in failure of such issue of Matthew, then to another Humberston, and his first son for life, &c., with remainders over to the other of the Humberstons for their lives successively, and to their sons when born for their lives, without giving any estate tail to any of them. Lord Chancellor Cowper said, that "though an attempt to make a perpetuity for successive lives be vain, yet, so far as is consistent with the rule of law it ought to be complied with." He, therefore, to attain this object, let in all the sons of these several Humberstons then already born to take estates for their lives; but where the limitation was to the son unborn, then such limitation was to be in tail male. A similar construction has also

been adopted in several subsequent cases: (*Hopkins* v. *Hopkins*, Ca. temp. Talb. 44; *Nicholl* v. *Nicholl*, 1 Blackst. Rep. 115; *Chapman and Oliver* v. *Brown*, 3 Burr. 1626; *Pitt* v. *Jackson*, *ib.* 51; *Mogg* v. *Mogg*, 1 Mer. 654; S. C. in Dom. Proc. 3 Bro. P. C. edit. Toml. 269.)

### 5. *Application of the Rule in Shelley's case to Copyholds.*

How far the rule in Shelley's case will affect copyholds.

The rule in *Shelley's case* will operate on copyhold as well as on freehold estates. Hence the same words as would have been sufficient to have vested the inheritance in the ancestor in the case of freehold property, respect being had to the different nature of the instruments, will have the same effect upon a surrender or devise of copyholds; a surrender operating in the same manner as a deed of conveyance, (*Lovell* v. *Lovell*, 3 Atk. 11; Wat. Cop. 108; Co. Cop. s. 49); and a will receiving the same construction as a devise of freeholds. (*Wright* v. *Kemp*, 3 T. R. 470, 473; *Widdowson* v. *Harrison*, 1 Jac. & Walk. 532.)

### 6. *As to Estates for Years.*

As to estates for years.

As there can be no inheritance of a term of years, the general rule of construction with respect to property of that kind is, that where the words used would have been sufficient to have passed the inheritance either in fee or in tail, it will pass the absolute interest in personal estate. The rule, however, is subject to some modifications which I shall take care to allude to when I come to treat of titles to estates for years.

### 7. *What Terms will supply the place of regular Words of Limitation.*

Words which in a deed would create a fee-simple may pass an estate tail in a will.

In wills, the courts, in order to effectuate the testator's intention, have allowed other terms to supply the place of the words "heirs of the body." Hence, a devise to a man and his heirs male will pass an estate tail, though a similar limitation, if contained in a deed, will create an estate in fee-simple: (1 Prest. Estates, 526.) The word "*issue*," also, when used in a collective sense, as extending to and comprehending the issue from generation to generation, will receive a similar construction with the words "*heirs of the body*." And even the words "sons," "children," &c., although properly speaking descriptive only of persons filling those characters, and consequently words of purchase, and not of limitation, may yet, when it is manifest the testator intended to use them in the latter sense, be allowed to receive that construction.

When "issue" will be construed to be a word of limitation.

The word "*issue*," although a word of limitation, whenever it is used in a collective sense, is yet of less determinate meaning than the words "heirs of the body;" the latter being mere technical words, admitting of but one meaning; whereas the word "issue" is capable of more; for in the statute *de Donis* it is used both as synonymous with children, and as descriptive of descendants of every degree; and notwithstanding the latter might be its *primâ facie* meaning, yet the authorities show that it will yield to the intention of the testator to be collected from the will; and, therefore, it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do: (*Lees* v. *Mosley*, 1 You. & Coll. 589.) When the word "issue" has been construed as a word of purchase, it has generally been where expla-

natory words have shown that the testator meant to use the term in the same sense as children, sons, &c. Therefore, if a testator was to devise to "A. and his issue," which standing alone would undoubtedly pass an estate tail, and was afterwards to go on and state, "the eldest of such sons to be preferred to the younger," these subsequent words would explain the issue to mean sons, and no more. So a devise upon trust to transfer one moiety to the issue of S. to he paid to them at their respective ages of twenty-one, and if only one child, then to such one child, for his, her, or their benefit, would restrict the word "issue" to mean children: (*Carter* v. *Bentatt*, 2 Beav. 551; see also *Ryan* v. *Cowley*, Lloyd & Goold, 10; *Machell* v. *Weeding*, 8 Sim. 4; *Pruen* v. *Osborn*, 11 *ib.* 143.) Generally speaking, however, the word "issue" will be considered as a word of limitation; and notwithstanding there are some decisions to the contrary, the weight of authority is decidedly in favour of the construction that words of superadded limitation engrafted on the limitation to the issue, and even describing a mode of descent inconsistent with an estate to the ancestor (as a devise to A. for life, with remainder to the issue male of his body, and their heirs for ever), will be insufficient to convert the issue into purchasers. The principal cases in favour of this construction are, *Shaw* v. *Weigh* (1 Eq. Ca. Abr. 184, pl. 28; S. C. 2 Str. 798); *Dodson* v. *Grew* (Wilm. 272; S. C. 2 Wils. 322); *King* v. *Burchell* (1 Eden, 424); *Denn dem. Webb* v. *Puckey* (5 T. R. 299); *Frank* v. *Stovin* (3 East, 544); *Hodson* v. *Merest* (9 Pri. 559); *Mogg* v. *Mogg* (1 Mer. 654); *Tate* v. *Clarke* (1 Beav. 100.) Opposed to it are, *King* v. *Melling* (1 Lev. 58); *Loddington* v. *Kime* (1 Salk. 224; S. C. Lord Raym. 203); *Backhouse* v. *Wells* (1 Eq. Ca.

"Issue," generally speaking, is considered to be a word of limitation.

Abr. 184, pl. 27); *Doe dem. Cooper* v. *Collis* (4 T. R. 294); *Doe dem. Davy* v. *Burnsall* (6 T. R. 30); S. C. under the name of *Burnsall* v. *Dewy* (1 Bos. & Pull. 215); *Doe dem. Gilman* v. *Elvey* (4 East, 313); *Lees* v. *Mosley* (1 You. & Coll. 589.)

When the words "children," "sons," &c. will be construed as words of limitation.

Although the words "children," "sons," &c. are, in their ordinary signification, words of purchase; yet where there is a manifest intent that they shall take under the will, which must altogether fail unless they can take through their parent, in that case either of these terms may become words of limitation, and be construed in the same sense as "heirs of the body;" and then, provided the parent takes a preceding estate of freehold, uniting with that estate, will vest the inheritance in him. But this construction will only be allowed where the children can take in no other way. Hence a devise to "A. and his children" will, if A. had any children at the time of the devise, vest a joint estate in all, both parent and children, as purchasers; but if A. had no children, he will then take an estate tail, in order to let in the limitations in favour of the children, the latter of whom would otherwise be debarred from all benefit under the will; for they could not take as immediate devisees, not being in existence; nor by way of remainder, the devise being in express terms immediate to A. and his children: (*Wild's case*, 6 Rep. 17; Bendl. 30; Bulstr. 219; *Davie* v. *Stephens*, Doug. 321; *Seale* v. *Barters*, 2 B. & Pull. 485.)

"Son," or "sons," when considered as a word of limitation.

The word "son," or "sons," though generally speaking a word of purchase, yet when used with a view to the whole class, and not as a strict literal description of them in their usual character, may become a word of limitation, and thus bring a preceding estate of freehold in the parent within the rule in *Shelley's case*. As

where lands are limited to A. generally, and if he shall die without having a son, or sons, that the lands shall remain over, in which case the word "son" will be considered as *nomen collectivum*, and synonymous with heirs male of the body, and thus vest the inheritance in tail in A. (*Byfield's case*, cited by Hale, C. J. in *King* v. *Melling*, 1 Ventr. 231 ; *Milliner* v. *Robinson*, 1 Moor. 682 ; *Wild* v. *Lewis*, 1 Atk. 432 ; *Robinson* v. *Robinson*, 1 Burr. 38 ; S. C. 3 Bro. P. C., under the name of *Robinson* v. *Hicks* ; *Doe* v. *Mulgrave*, 5 T. R. 323 ; *Mellish* v. *Mellish*, 2 B. & C. 520 ; *Garrod* v. *Garrod*, 2 B. & Ad. 87 ; *Doe dem. Jones* v. *Davies*, 4 Barn. & Ad. 43 ; *Raggett* v. *Beatty*, 2 Moo. & P. 612 ; *Doe dem. Jearrad* v. *Bannister*, 7 Mee. & Wels. ; *Doe dem. Burrin* v. *Charlton*, 1 Man. & G. 429 ; S. C. 1 Scott, 290.) But, if after devising to A. for life, with remainder to his sons or daughters generally, or for life, or in tail, there is a devise over in default of issue of A., then the term "issue" will be construed to mean the kind of issue before described, and confine the word "sons" to its strict literal import : (*Doe dem. Buddon* v. *Page*, 3 T. R. 87 ; *Doe dem. Phipps* v. *Mulgrave*, 5 *ib.* 230 ; see also *Bamfield* v. *Popham*, 1 P. Wms. 54 ; *Ginger dem. White* v. *White*, Willes, 348 ; *Comberbatch* v. *Perry*, *ib.* 484 ; *Rex* v. *Stafford* (*Marquis of*), 7 East, 521 ; *Foster* v. *Romney*, 11 East, 594 ; *Tooley* v. *Gunnis*, 4 Taunt. 313 ; *Doe dem. Liversage* v. *Vaughan*, 5 B. & A. 646.) Yet, if the testator, instead of running through the whole line of A.'s sons, had stopped short at some particular point in the enumeration, and had then inserted a limitation over in default or failure of issue, A. would have taken an estate for life, with remainder to his first and other sons, either for life or in tail, accordingly as their estates were

limited to them, with remainder to A. in tail by implication: (*Langley* v. *Baldwyn*, 1 P. Wms. 753, n.; *Attorney-General* v. *Sutton*, *ib.* 753; *Robinson* v. *Robinson*, 1 Burr. 38; *Doe dem. Bean* v. *Halley*, 5 T. R. 5.) This construction is only applicable, however, to wills made previously to the year 1838, for under the late Will Act (1 Vict. c. 26), as we have already seen, words importing a failure of issue are to be construed to mean a failure of issue at the time of his death; consequently, as to wills made subsequently, a devise to A. for life, with remainder to his sons, whether including the whole or stopping short at a definite number, with a limitation over in default of issue, will be restrained to the sons, and will not, therefore, enlarge the estate in their parent, who will take simply a life estate, with remainder to his sons as purchasers.

8. *When an Estate Tail will arise by Implication.*

When an estate tail will arise by implication.

In the case of a devise of real property, an estate tail may sometimes arise by implication, without any words of express devise. One of the instances in which this construction has been allowed has been where a testator devised his lands to a third party, in case a person who was his heir at law should die without issue (Dy. 330; *Walter* v. *Drew*, Com. 372), or without heirs (*Goodridge* v. *Goodridge*, Willes, 369); in which case, the heir was held to take an estate tail by implication, and the limitation over was considered good as a contingent remainder. But this rule had no application where the devise over was in case a stranger should die without heirs, or issue, unless he took some preceding estate under the will (*Gardiner* v. *Sheldon*, Vaugh. 259; S. C. 1 Eq. Ca. Abr. 179, pl. 6); and

the limitation over must have failed in the latter instance, as being an executory devise to take into effect after an indefinite failure of issue. But with respect to wills made subsequently to 1838, as the 29th section of the new Act (1 Vict. c. 26) confines the dying without to the death of the party, the heir would not take an estate tail, but an estate in fee-simple, subject to a limitation over, by way of executory devise, which would now be good ; the failure of issue under the construction of the above statute being restricted to the lifetime of a person in being. But it seems that the statute will not apply when the devise over is in case the heir should die without heirs, which would equally have raised the implication of an estate tail, as a limitation over, in case he should die without issue, would have done (*Goodridge* v. *Goodridge*, Willes, 369); because the act confines itself to the terms "without issue," which it limits to the death of the party, unless a contrary intention appears *by reason of his having a prior estate tail or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person, or issue, or otherwise ;* neither of which occurs in the instance of a limitation over in case a party should die without heirs ; consequently, it seems that a devise in the latter terms must receive the same construction now, as it would have done previously to the passing of the act.

### 9. *Cross Remainders.*

When cross remainders will be implied.

Cross remainders between tenants in tail may also be ranked under the head of estates tail arising by implication without any direct words of devise. This happens when lands are given in undivided shares to two or more for particular

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*Of estates tail.*

estates, as a devise to A., B., and C., as tenants in common in tail, and for want of such issue, to the testator's own right heirs; in which case the testator's intention would be construed to be, that the property should be enjoyed by A., B., and C., and their issue, as long as there shall be any such, and that on the death of either of the tenants in tail without issue, his share would go over to the survivors, so that nothing shall go over to the testator's heirs till after the determination of all the estates tail. In such case A., B., and C. take their original shares as tenants in common, and the remainders limited to them on the determination of the particular estates are known by the name of cross remainders.

Whether there is a stronger presumption in favour of cross remainders, between two, than between more persons.

It has been said that, as between two, there is a stronger presumption in favour of cross remainders than between more persons; but no such distinction in reality exists, as cross remainders will not be raised between two unless an intention to that effect can be collected; and when that can be done, the same construction will apply equally to a greater number: (Dy. 30; *Wright* v. *Holford*, Cow. 31; *Phiphard* v. *Mansfield*, Cow. 797.) And notwithstanding it seems formerly to have been considered that the word "respective," or any word of similar import, was sufficient to repel the implication of cross remainders (*Comber* v. *Hill*, Str. 969; *Williams* v. *Brown*, *ib.* 996; *Davenport* v. *Oldis*, 1 Atk. 579; *Perry* v. *White*, Cow. 777), this doctrine has been since exploded, and it is now settled that the words "respectively," or "several and respective," or other words of similar import, are insufficient to prevent the implication of cross remainders: (*Watson* v. *Foxon*, 2 East, 36; *Staunton* v. *Peck*, 2 Cox, 8; *Doe dem. Gorges* v. *Webb*, 1 Taunt. 234; *Green* v. *Stephens*, 12 Ves. 419; 17 *ib.* 64.)

Cross remainders will not be implied unless with respect to the same property.

In all the instances in which cross remainders have been raised by implication, the parties, though they took distinct shares, yet they all took them in the same property; for if a testator were to devise separate estates, as Blackacre to A., Whiteacre to B., and Greenacre to C., and afterwards to limit them over on all the devisees dying without issue, as the subject-matters of the devise would in that case be distinct and several, no cross remainders would be implied between them; (*Gilbert* v. *Witty*, Cro. Jac. 655; S. C. Carth. 172; *Cole* v. *Levingston*, 1 Vent. 224; see also *Holmes* v. *Meynel*, 2 Roll. 1102; S. C., T. Jones, 172.)

## SECTION V.

### OF ESTATES IN JOINT TENANCY AND TENANCY IN COMMON.

1. *Of the Construction of Deeds and Wills with respect to the Creation of these Estates.*
2. *The Construction of a Joint Tenancy favoured in the case of Executory Trust.*
3. *Words importing a Division will not always create a Tenancy in Common.*

### 1. *Of the Construction of Deeds and Wills with respect to the Creation of these Estates.*

How estates in joint tenancy and tenancy in common are created.

THE creation of an estate in joint tenancy, or in common, depends upon the particular wording of the instrument under which the tenant claims. In wills the construction is governed by the intent, and the leaning of the courts at the present day being against a joint tenancy, though formerly it was otherwise, they have allowed words to import a tenancy in common, which in a common law conveyance would have created an estate in joint tenancy. Thus, where the will contains any expressions importing a division, as equally to be divided (*King* v. *Rumball*, Cro. Jac. 448; *Blisset* v. *Cranwell*, 3 Lev. 371; *Bolger* v. *Mackell*,

5 Ves. 509); or to two or more equally (*Lewin* v. *Cox*, Cro. Eliz. 695; *Loveacres* v. *Blight*, Cow. 352; *Denn* v. *Gaskin*, *ib.* 657); or equally amongst them (*ib. id.*); or equally to be divided between them (*Thickness* v. *Vernon*, 1 Vern. 32; *Blissett* v. *Cranwell*, 1 Salk. 226; *Fisher* v. *Wigg*, 1 P. Wms. 13; *Bagwell* v. *Dry*, *ib.* 699; *Prince* v. *Heylin*, 1 Atk. 493; *Stones* v. *Heurtley*, 1 Ves. sen. 164; *Mendes* v. *Mendes*, *ib.* 89; *Jolliffe* v. *East*, 3 Bro. C. C. 25; *Butler* v. *Stratton*, *ib.* 367; *Jenour* v. *Jenour*, 10 Ves. 562, 569; *Lashbrook* v. *Cock*, 2 Mer. 70); or part and part alike (*Heathe* v. *Heathe*, 2 Atk. 121); or "share and share alike" (*Campbell* v. *Campbell*, 4 Bro. C. C. 15); or "respectively" (*Ferret* v. *Frampton*, Sty. 434); or any other words which demonstrate an intention that the devisees shall take as tenants in common, will create that estate (*Ettrecke* v. *Ettrecke*, Ambl. 656; *Sheppard* v. *Gibbons*, 2 Atk. 442; *Perkins* v. *Baynton*, 1 Bro. C. C. 118.) Still for all this, unless there are some expressions in the will by which it can be made apparent that the testator contemplated a tenancy in common, the general rule of legal construction must prevail; consequently, a simple devise to two or more persons will make them joint tenants, and this whether it be a devise of real property or a bequest of personal estate: (*Anon.* Cro. Eliz. 131; *Davis* v. *Kemp*, Carth. 4; S. C. 1 Eq. Ca. Abr. 207, pl. 7.; *Shore* v. *Billingsley*, 1 Vern. 482; *Webster* v. *Webster*, 2 P. Wms. 347; *Willing* v. *Baine*, 3 *ib.* 113; *Barnes* v. *Allen*, 1 Bro. C. C. 181; *Campbell* v. *Campbell*, 4 *ib.* 15; *Morley* v. *Bird*, 3 Ves. 629; *Stuart* v. *Bruce*, *ib.* 632; *Whitmore* v. *Trelawny*, 6 *ib.* 129; *Crooke* v. *De Vandes*, 9 *ib.* 204; *Doe dem. Young* v. *Sotheron*, 2 B. & Ad. 628.)

### 2. *As to Executory Trusts.*

The construction of a joint tenancy favoured in the case of executory trusts.

In the case of executory bequests a different rule prevails than in devises of the legal estate, for there the court will not direct a joint tenancy unless it is apparent on the face of the will that such was the testator's intention: (*Marryatt* v. *Townley*, 1 Ves. sen. 102.) And even where a testator has used the words "joint tenants," yet if an estate of that kind would be inconsistent with the general object of his will, the court in decreeing a settlement would direct a conveyance to the parties as tenants in common, and not as joint tenants. Thus, where trustees were directed, as soon as the testator's daughters attained their respective ages of twenty-one, to convey to the heirs of their bodies, as joint tenants, and for want of such issue over, Lord Hardwicke decreed that the conveyance should be made to the daughters as tenants in common, with cross remainders between them, which he thought was the best mode of giving effect to the words: (*Marryatt* v. *Townley*, *sup.*)

### 3. *Words importing a Division will not always create a Tenancy in Common.*

When words importing a division will not create a tenancy in common.

Notwithstanding that a devise in words importing a division will, generally speaking, create a tenancy in common, yet this rule only prevails where the will contains no words to negative that intention; for where it has appeared that it was the intention of the testator that the share of any of the devisees should survive, an estate in joint tenancy has been held to pass, in order to carry out that intent, although words may have been employed which would otherwise have created a tenancy in common: (*Barker* v. *Giles*,

2 P. Wms. 280; *Tuckerman* v. *Jefferies*, Holt, 370; S. C. 11 Mod. 108; *Frewin* v. *Relfe*, 2 Bro. C. C. 220; *Armstrong* v. *Eldridge*, 3 *ib.* 215.) Still, if there is *an express gift* to the survivor, the construction may be otherwise, as a tenancy with a benefit of a survivorship is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy: (*Doe dem. Borwell* v. *Abey*, 1 Mau. & Selw. 428; see also *Blissett* v. *Cranwell*, 1 Salk. 226; *Stones* v. *Heurtley*, 1 Ves. sen. 165; *Cripps* v. *Wolcott*, 4 Mad. 11.)

## SECTION VI.

### OF CONTINGENT REMAINDERS, CONDITIONAL LIMITATIONS, AND EXECUTORY DEVISES.

1. *Of the Distinction between Contingent Remainders and Conditional Limitations.*
2. *Distinction between an Executory Devise and a Contingent Remainder.*
3. *How Contingent Remainders might have been destroyed.*
4. *Recent Enactments respecting Executory Devises and Contingent Remainders.*
5. *Whether Conditional Limitations are capable of being barred.*
6. *Of the Requisites to support a Conditional Limitation.*
7. *What Conditions may be valid.*
8. *How a Conditional Limitation will be affected by the Failure of the Estates to which it is annexed.*
9. *Impossible Conditions.*
10. *Conditions in Restraint of Marriage.*

Introductory remarks.

In perusing an abstract, it will be requisite to keep the distinctions between contingent remainders, conditional limitations, and executory devises constantly in mind.

## 1. *Of the Distinction between Contingent Remainders and Conditional Limitations.*

A contingent remainder may be defined as an estate in remainder *preceded by a previous estate of freehold*, limited to take effect to a dubious and uncertain person, as to the eldest son of A., then unborn; or to the right heir of B., who is then still living; or upon an uncertain or dubious event, as to A. for life, *and in case B. survives him*, (which is, of course, uncertain), then with remainder to B. for life, in tail, or in fee. A conditional limitation renders it necessary that some act should be done, or that some event which will not certainly happen should take place before the limitation is to take effect, and which, when it occurs, has the effect of rescinding or destroying the preceding existing estate, and vesting the property in the party claiming under the condition. In this latter respect it differs materially from an estate in remainder, which, whether vested or contingent, never takes effect in abridgment of the preceding estate, but always awaits its original and regular determination.

Definition of a contingent remainder.

Of a conditional limitation.

This distinction is very ably and accurately pointed out by Mr. Fearne in his valuable Essay on Contingent Remainders, where he says (p. 14), "The true point of distinction, as I take it, between such conditional limitations over as are and such as are not remainders in the strict sense of that word, lies here; the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession upon an event which may happen before the regular de-

Distinction between a conditional limitation and a remainder.

termination to which the first estate is liable from the nature of its original limitation, and so as to rescind it. And in the latter case I apprehend it is the same thing, whether the whole is disposed of in the first limitation, or not. Thus, if I limit an estate to the use of A. for life, or to the use of A. indefinitely, provided that, when C. returns from Rome, it shall thenceforth immediately be to the use of B. in fee; here the first estate is an estate for the life of A. (not an estate limited only till C.'s return); the remnant, therefore, of the whole fee in this case is what remains expectant on the determination of A.'s life estate, by such events as a life estate is liable to be determined by; and therefore, when, after such a limitation to A., I limit to the use of B. till C.'s return to Rome, and so take up and make such new estate to commence and take effect in possession, not from any regular determination of the estate before limited to A. (his estate being for life, and not merely until C.'s return from Rome), but from an event which may happen sooner, it is evident this limitation to the use of B. is not confined to the remnant of the estate expectant on the particular estate before given to A., but may eventually interfere with, and in part repeal and defeat that first estate, instead of awaiting its final expiration or determination; and therefore it does not fall within the above definition of a remainder. But limitations of this nature are properly termed conditional limitations, to distinguish them, on the one hand, from conditions, of which only the grantor or his heir can take advantage, and, on the other, from remainders, in the strict and proper sense of the word, as above defined. And though these conditional limitations are not valid at common law, yet within certain limits they are good in wills and conveyances to uses."

### 2. *Distinction between an Executory Devise and a Contingent Remainder.*

In what respects an executory devise differs from a contingent remainder

An executory devise differs from a contingent remainder in five essential particulars: 1st. Because it is admitted only in wills, whereas a contingent remainder is admitted both in wills and deeds. 2nd. That an executory devise does not require any particular estate of freehold to support it, which is absolutely necessary to the existence of a contingent remainder. 3rd. That an estate by way of executory devise may be limited after an estate in fee-simple, which a contingent remainder cannot be. 4th. That as an executory devise does not, like a contingent remainder, require any particular estate to support it, it may be limited to commence *in futuro*, or by way of remainder expectant upon a term of years. 5th. That as the person who is to take under an executory devise has not a present but a future interest, his estate cannot be barred or destroyed by any alteration in the estate out of which, or after which, it is limited.

### 3. *How Contingent Remainders might have been destroyed.*

Old laws respecting the destruction of contingent remainders.

It was formerly necessary that a contingent remainder should be supported by a preceding particular estate of freehold, and if that particular estate determined, the remainder determined also. When, therefore, there was tenant for life, with divers contingent remainders, he might not only by his death, but also by alienation, surrender, or by other methods have destroyed and determined his own life estate before any of those remainders became vested. As, for example, suppose A., tenant for life, with remainder to his eldest son unborn in tail, before any son was born,

had surrendered his life estate, he would thereby have defeated the remainder in tail to his son; for his son, not being *in esse* when the particular estate determined, the remainder could not then vest; and as it could not vest then, it could never, according to the rules before laid down, have vested at all. This caused the introduction of trustees to preserve contingent remainders in settlements of real property, in whom the estate becomes vested in remainder for the life of the tenant for life to commence when his determines. If, therefore, his estate determines otherwise than by his death, the estate of the trustees for the residue of his natural life will take effect, and become a particular estate in possession sufficient to support the remainders depending in contingency: (2 Blac. Com. 171, 172; Fearne C. R. 326.)

### 4. *Recent Enactments respecting Executory Devises and Contingent Remainders.*

Contingent remainders were formerly regarded in a more favourable light than executory devises.

Formerly, contingent remainders were looked upon in a more favourable point of view than executory devises; the rule of construction being, that whenever a future interest was capable of taking effect as a contingent remainder, it should never take effect as an executory devise: (*Purefoy* v. *Rogers*, 2 Saund. 380; *Walter* v. *Grew*, Com. 372; *Wealthy* v. *Bosville*, Rep. temp. Hardw. 258; *Carwardine* v. *Carwardine*, in Chan. 8 Jan. 1758; cited Fearne C. R. 388; S. C. 1 Eden, 27; *Tenny dem. Agar* v. *Agar*, 12 East, 253; *Doe dem. Cholmondeley (Earl and Countess of)* v. *Maxey*, *ib.* 589, 604; *Phillips* v. *Deakin*, 1 Mau. & Selw. 744.) But latterly, contingent remainders appear to have been looked upon less favourably, and a recent act of Parliament (7 & 8 Vict. c. 76, s. 8) actually went so far as to convert them all into

executory devises. This singular legal metamorphosis, which, during its ephemeral existence, excited no small amazement amongst the profession, was, however, repealed in the following session, by stat. 8 & 9 Vict. c. 106; but by the 8th section of which a very proper provision is made for protecting contingent remainders against the premature failure of the preceding particular estate. It is shortly as follows: "That a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner in all respects as if such determination had not happened."

Contingent remainders existing after 1844 are not to fail by the destruction of the prior particular estate.

### 5. *Whether Conditional Limitations are capable of being barred.*

A conditional limitation so far partook of the nature of an executory devise, that it could not have been barred by any act of the tenant for life. But where the limitations were after, or in defeasance, or in breach of a condition, annexed to an estate tail, a recovery by the tenant in tail, before the event or condition happened, would have barred the estate arising on that event or condition; and the same object may, it is apprehended, be now attained by a disentailing deed under the recent Fine and Recovery Substitution Act, 3 & 4 Will. 4, c. 74.

Conditional limitations, how far barrable.

### 6. *Of the Requisites to support a Conditional Limitation.*

The validity of a conditional limitation will depend upon the legality and possibility of the condition, and its not being repugnant or incon-

Of the requisites to support a conditional limitation.

sistent with the nature or quality of the preceding estate. Hence, if lands were to be devised in tail, with a proviso that, if the devisee should alienate the lands, they should go over to another, such a condition would be void. And, upon the same principle, it has been long since determined, that if lands are devised in tail, with a proviso that, if a tenant in tail suffered a recovery, his estate should cease, was a void condition, and consequently, that the limitation depending upon it must fail; the power to suffer a recovery being one of the inherent properties of an estate tail, and not to be restrained by condition (*Taltarum's case*, 18 Edw. 4 pl. 16; Co. Litt. 223, *a*, 224, *b*); limitation, custom (Cro. Jac. 96); recognizance (*Taylor* v. *Shaw*, Carth. 6, 22); statute (*Pool's case*, Moor. 610); or covenant (*Collins* v. *Plummer*, 1 P. Wms. 104.)

### 7. *What Conditions may be valid.*

Within what restrictions a condition against alienation may be supported.

And although a proviso against alienation generally is void, yet it will be otherwise if it be restricted to a particular time (*Smith and Davie's case*, 2 Leon. 38; Moor. 271; Hob. 13, 261); or to a particular person. And even a condition not to alien, unless it be to a particular person, has been holden good: (*Doe dem. Gill* v. *Pearson*, 6 East, 173, 180; 2 Smith, 295; and see also *Muschamp* v. *Bluet*, Bridg. Rep. 132.)

As to conditions for avoiding estates.

According to Mr. Fearne, a condition to avoid the preceding estate must determine it altogether, and not in part only, leaving it good as to the residue; and upon this principle it had been adjudged that a proviso to make the estate of the tenant in tail to cease during his life was void, for that although the whole estate may be determined by the condition, yet a part of it only during the tenant's life shall not; and that such a proviso is ineffectual on account of its repug-

nancy to a rule of law. This is certainly the case with respect to a condition properly so called, and of which none but the grantor and his heirs can take advantage, and which must therefore necessarily determine the whole estate to which it is subject; but there appears to be no reason why this construction should be extended to a limitation which operates in defeasance of a preceding estate, on the ground that it defeats the estate in part only; and it is observable in all the cases cited by Mr. Fearne in support of this doctrine (*Corbet's case*, 1 Rep. 83, *b*; *Jermyn* v. *Arscott*, cited 1 Rep. 85, *a*; *Mildmay's case*, 6 Rep. 40; *Fox* v. *Hinde*, Cro. Jac. 697), the limitation was either defective in the terms of its creation, or was repugnant to the nature of the incidents of the estate on which it was engrafted, or was contrary to the rules of law fixing the period within which such interests must be limited to arise.

Conditions for abridging an estate.

When, therefore, these circumstances do not occur, it seems that a condition that on the happening of certain events an estate tail shall be reduced to an estate for life only may be good. This construction has been made in the case of a condition annexed to a devise of an estate in fee-simple (*Wright* v. *Wright*, 1 Ves. sen. 409), and upon the same principle it seems that it would also be extended to a condition annexed to an estate tail. And where the limitation over is not to take effect until a certain period, the preceding estate will not be divested until that period arrives. Hence where there was a devise to a wife, provided she remained a widow, but in case she married a second husband then to testator's nephew when he should attain the age of twenty-three years, it was held that the widow had an estate till the nephew attained the age of twenty-three, though she herself got married before that time: (*Doe dem. Dean and Chapter*

*of Westminster* v. *Freeman*, 1 T. R. 389; Fearne C. R. 240.)

8. *How a Conditional Limitation will be affected by the Failure of the Estates to which it is annexed.*

How a conditional limitation will be affected by the failure of the preceding estate.

When a remainder is limited to take effect on breach of a condition annexed to a particular estate, which never arises, as where it is limited to a person not *in esse* who never comes in being (*Jones* v. *Westcomb*, 1 Eq. Ca. Abr. 245, pl. 10; *Andrews* v. *Fulham*, 1 Wils. 107, cited *Gulliver* v. *Wickett*, 1 Wils. 105; *Statham* v. *Bell*, Cow. 40; *Murray* v. *Jones*, 2 Ves. & Bea. 313), or fails of effect, as by the death of the party to whom it is limited, in the testator's lifetime (*Scatterwood* v. *Edge*, 1 Salk. 229; *Hopkins* v. *Hopkins*, Ca. temp. Talb. 44; *Avelyn* v. *Ward*, 1 Ves. sen. 420; *Doe dem. Wells* v. *Scott*, 3 Mau. & Selw. 300), the limitation over will, nevertheless, take effect; the first estate being considered as a preceding limitation, and not a condition to give effect to the remainder, which, though it cannot operate strictly as such, the preceding estate which was to have supported it having failed, may still be good as a conditional limitation, or by way of executory devise: (*Scatterwood* v. *Edge, supra;* see also Fearne C. R. 510, 512.)

Otherwise where the particular estate takes place and fails in any other event.

But where a preceding estate to which a condition is annexed actually takes place, an estate limited to take effect on breach of the condition will fail if the estate be determined by any other event; as where A. devised his estate to his son in tail male, remainder to B. for life, remainder to his (B.'s) sons in tail male, on condition that he should change his name; and if he or any son of his refused to do so, then he directed the devise to be void, and gave the estate to D., &c.; the son died without issue; B. performed the condi-

tion and died without issue; and upon a question whether D. should have the estate after B.'s death, the judges of the King's Bench certified their opinion that D. took no estate on the death of B., but that it went to the testator's heir-at-law by law; which opinion was afterwards confirmed by the House of Lords: (*Amherst* v. *Lytton*, 3 Bro. P. C. 486; Fearne C. R. 238; see also *Sheffield* v. *Orrery*, 3 Atk. 282.)

### 9. *Impossible Conditions.*

Impossible conditions are a mere nullity.

An impossible condition is a mere nullity: (Puff. lib. 3, s. 2; Co. Litt. 206.) If it be precedent to the estate, both the estate and the condition are alike invalid; if subsequent to the estate, then the estate will be absolute and the condition void: (1 Ins. 206; 9 Rep. 128.) Where, however, a condition is of two parts, the one possible and the other impossible, the condition will be good as far as the possible part is concerned, and void as to the impossible part: (Cro. Eliz. 780; 1 Roll. Abr. 44; 2 Mod. 202.) And if a condition becomes impossible by the act of God; as where an estate is devised to A., upon condition that within a certain time he intermarry with I. S. before the expiration of which period I. S. dies; or a devise on condition that he marry with the consent of C. and D., who die before the marriage; the condition will be discharged, and the estate will become absolute: (*Thomas* v. *Howell*, 1 Salk. 170; *Payton* v. *Bury*, 2 P. Wms. 626; *Graydon* v. *Hicks*, 2 Atk. 16; *Lester* v. *Garland*, 15 Ves. 248; *Aistabie* v. *Rice*, 3 Mad. 256.) Nor can a condition be annexed to an estate created under a power without an express authority: (*Pawlett* v. *Pawlett*, 1 Wils. 224; *Alexander* v. *Alexander*, 2 Ves. sen. 640; *Lane* v. *Page*, Ambl. 233; see also *Burleigh* v.

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*Pearson*, 1 Ves. sen. 281; *Daubeny* v. *Cockburn*, 1 Mer. 626, 645.)

### 10. *Conditions in Restraint of Marriage.*

Conditions in restraint of marriage not generally favoured.

Conditions in restraint of marriage have not, it is said, been generally favoured, being considered contrary to sound policy; and if the condition be such as amounts to an absolute injunction of celibacy, it will be void. But almost any restriction, unless it goes to that extent, may be supported: (Co. Litt. 42; *Williams* v. *Porter*, 1 Cha. Cas. 142; *Booth* v. *Booth*, 2 *ib.* 109; *Harvey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 *ib.* 330; *Reeves* v. *Herne*, 5 Vin. Abr. 343, pl. 31; *Pulling* v. *Reddy*, 1 Wils. 21; *Scott* v. *Tyler*, 2 Bro. C. C. 431; *Stackpole* v. *Beaumont*, 3 Ves. 98; *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Long* v. *Ricketts*, 1 Sim. & Stu. 179.)

What conditions in restraint of marriage have been holden good.

Hence a condition prescribing the ceremonies and place of marriage has been holden good; so where the condition limits the prohibited time to twenty-one, or any other age, provided it be not used evasively as a cover to restrain marriage generally: (*Scott* v. *Tyler*, 2 Bro. C. C. 431.) An injunction to ask consent is also lawful: (*Sutton* v. *Jewkes*, Cha. Rep. 95; *Creagh* v. *Wilson*, 2 Vern. 572; *Ashton* v. *Ashton*, Pre. Cha. 226; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munkley*, 1 Bro. C. C. 304; *Dashwood* v. *Bulkeley*, 10 Ves. 230.) A condition prohibiting a widow from marrying is not unlawful: (*Barton* v. *Barton*, 2 Vern. 308.) Neither is a condition not to marry a particular person (*Stackpole* v. *Beaumont*, 3 Ves. 97); or one of a particular country, as a Scotchman, or the like: (*Perrin* v. *Lloyd*, 9 East, 170.)

Distinction between conditions precedent and

There is a diversity, however, in the construction of conditions of this kind, depending, first, upon whether such conditions are subsequent or

precedent; secondly, upon the nature of the property to which they are annexed. If subsequent, and attached to a devise of real estate, and there is a limitation over on breach of the condition, then it will be a conditional limitation (*Scholastica's case*, Plow. 403; 3 Rep. 206, *a*; 2 *Large's case*, 2 Leon. 82; *Rundale* v. *Eiley*, Carth. 170; Dy. 127; *Fry's case*, 1 Ventr. 199; *Anon.* 2 Mod. 7), on breach of which the party to whom the estate is limited over will become entitled without entry or claim. If no estate be limited over, then it will be a condition at common law, of which, until recently, the heir of the testator could alone have taken advantage; but now a right of entry for condition broken may be granted by deed (8 & 9 Vict. c. 196, ss. 5, 6), or devised by will (1 Vict. c. 26, s. 2); still, no actual estate will be acquired in either case, until the heir, grantee, or devisee make an actual entry on the premises; and unless this be done within twenty years after breach of the condition, the estate will become absolute: (stat. 3 & 4 Will. 4, c. 27, ss. 2, 3.) If a condition subsequent is attached to a bequest of personal estate, then, if there is a limitation over, the party to whom it is so limited over, will become entitled immediately upon such breach being committed; but if there be no limitation over, the condition will be considered as only *in terrorem*, to make the party careful, but not to avoid the gift (*Bellasis* v. *Ermine*, 1 Cha. Cas. 22; *Sutton* v. *Jewkes*, 2 *ib.* 95; *Hicks* v. *Pendarves*, Freem. 41; *Stratton* v. *Grymes*, 2 Vern. 357; *Aston* v. *Aston*, *ib.* 452; *Semphill* v. *Bayly*, Pre. Cha. 562; S. C. 1 Eq. Ca. Abr. 213; *Chauncy* v. *Graydon*, 2 Atk. 616; *Wheeler* v. *Bingham*, 3 Atk. 364; *Clarke* v. *Parker*, 19 Ves. 14); unless the marrying without consent be confined to the minority of the party, in which a marriage contrary to, or

conditions subsequent

without such consent, will be a forfeiture: (*Stackpole* v. *Beaumont*, 3 Ves. 98.) When conditions in restraint of marriage are annexed to portions charged on real estate, the same rules of construction will prevail as in the case of a devise of the lands themselves; if on personal estate, the same rules of construction as are applicable to bequests of personal property.

Where marriage is a condition precedent.

But in either case, if the condition attached to the gift is a condition precedent, that condition must be performed before the party claiming under it can become entitled; the performance of the condition forming, in fact, the essence of the gift (*Garbut* v. *Hilton*, 1 Atk. 381; *Ellis* v. *Smith*, 1 Sch. & Lef. 1; *Lloyd* v. *Branton*, 3 Mer. 116); consequently, if the party die before the marriage, the donation must fail altogether: (*Harvey* v. *Aston*, 1 Atk. 361; *Atkins* v. *Hiccocks*, *ib.* 500; *Elton* v. *Elton*, 3 *ib.* 504; *Reeves* v. *Herne*, 5 Vin. Abr. 343, pl. 31; *Stackpole* v. *Beaumont*, 3 Ves. 98; *Monkhouse* v. *Holme*, 1 Bro. C. C. 298; *Lowe* v. *Manners*, 5 B. & Ald. 917; *Long* v. *Ricketts*, 2 Sim. & Stu. 179.) It has, however, been decided that a requisition to marry with consent, imposed by a testator on his daughters, who were then spinsters, did not apply to a daughter who afterwards married in the testator's lifetime, and was a widow at his decease: (*Crommelin* v. *Crommelin*, 3 Ves. 227.) To adopt a contrary construction would produce the absurdity of obliging the legatee to marry again in order to provide for her children, if any, by her first husband; and it seems that in such a case, if a legatee marry with her father's consent, or even his subsequent approbation, she will be entitled to all the benefit attached by him to marrying with the required consent (*Wheeler* v. *Warner*, 1 Sim. & Stu. 304); as it is impossible to suppose that a tes-

tator could intend to place a daughter, marrying with consent, in a worse situation than if she had married with that of the trustees.

It sometimes happens that an estate is devised upon condition that the devisee shall assume the name and arms of the testator. In cases of this kind a question has sometimes arisen, as to whether the voluntary assumption of the name would satisfy the condition, or it is requisite that the devisee should obtain a proper licence or authority from the crown, or the still more solemn act of the legislature, where neither of those modes of procedure are prescribed by the terms of the condition. But it seems that, where neither of such modes of procedure are directed, an unauthorized assumption of the name will be sufficient: (*Lowndes* v. *Davies*, 2 Scott, 71.) And even in a case (*Doe dem. Luscombe* v. *Yates*, 1 Dow. & Ry. 187; S. C. 5 B. & Ald. 543; see also *Hawkins* v. *Luscombe*, 3 Swanst. 375) where a condition was imposed upon devisees, *not bearing the name of Luscombe*, that they, within three years after being in possession, should procure their names to be altered to Luscombe by act of Parliament; it was held that this requisition did not apply to an individual who, before he came into possession, had voluntarily and without any special authority assumed the name of Luscombe; he being, it was considered, a person "bearing a name" within the meaning of the will.

Condition to assume testator's name and arms.

A condition to determine the estate in the case of bankruptcy or insolvency may be either annexed to a devise, or a settlement of real or personal property; but to be effectual it must determine the whole estate; for it will not be permitted to avoid it as to part, and leave it good as to the residue: (*Lockyear* v. *Savage*, 2 Str. 947; *Dommett* v. *Bedford*, 3 Ves. 149; *Foley* v. *Burnell*, 1 Bro. C. C. 274; *Shee* v.

Condition to avoid the estate in the event of bankruptcy or insolvency.

*Hale*, 13 Ves. 494; *Brandon* v. *Robinson*, 18 *ib.* 429; *Cooper* v. *Wyatt*, 5 Mad. 482.)

When an estate may be enlarged upon condition or contingency.

As on the one hand an estate may be destroyed by the breach of a condition, or the happening of a contingency, so on the other it may arise or become enlarged by the performance of a condition, or the happening of some uncertain specified event; as, for example, if lands were limited to A. for life, or in tail, and that if he perform such an act, or if some particular occurrence take place, he shall have the fee; in either of these cases, A. on performing the condition, or on the happening of the contingency, will be entitled to the fee: (*Stafford's* (*Lord*) *case*, 8 Rep. 74; Fearne C. R. 279.) But in order that an estate may be so enlarged, it must have the five following incidents:—1. The condition upon which it is to arise must be both possible and legal; for upon an impossible condition it cannot, and upon an unlawful one it shall not, increase: (Shep. Touch. 129.) 2. There ought to be a particular estate as a foundation for the increase to take effect upon, which particular estate Lord Coke held must not be an estate at will, nor revocable, nor contingent. 3. Such particular estate should continue in the lessee, grantee or devisee, until the increase happens, without any alteration of privity of estate by alienation by such grantee, lessee or devisee, though the alienation of the grantor will not affect it; nor is it necessary that such increase should take place immediately upon the determination of the particular estate, for it may enure as a mediate remainder, subsequent to an immediate remainder for life or in tail in somebody else. 4. The increase must vest and take effect immediately upon the performance of the condition; for if an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place. 5. The

particular estate and increase must take effect by one and the same instrument, or deed, or by several deeds delivered at one and the same time; because the particular estate, and the increase thereupon, is only a grant to take effect out of one and the same root; and notwithstanding the increase vest at a different time, yet when it is vested it has its force and effect from the same grant: (Fearne C. R. 179, 180.)

## SECTION VII.

### OF THE DOCTRINE OF ELECTION.

1. *Definition of the Doctrine of Election.*
2. *What will be sufficient to put a Party to his Election.*
3. *What Persons will be bound to elect.*
4. *What Acts will amount to an Election.*
5. *Application of the devised Property when the Party put to his Election chooses to take in Opposition to the Will.*

### 1. *Definition of the Doctrine of Election.*

Election consists in alternate donations.

In this place it will be proper to make some remarks upon the doctrine of election. This doctrine consists in alternate donations, with an intention, either express or implied, that one shall be in substitution for the rest; not that the donee shall be entitled to both benefits, but to the choice of either (1 Swanst. 395, n.); consequently, the second gift is only designed to take effect in case of his declining the first; and the substance of the gifts combined is an option, which, by an equitable arrangement, gives effect to a donation of that which is not the property of the donor, and over which he has no legal power or control: (*Boughton* v. *Boughton*, 2 Ves. sen. 12; *Streatfield* v. *Streatfield*, Ca. temp. Talb. 179.) Hence, where a person has a claim under a will, and also a claim altogether independent of it, he will be obliged to elect between his original and substituted rights, and will not

be allowed to accept the former, unless he also consents to renounce the latter. Thus, in *Noyes* v. *Mordaunt* (2 Vern. 580), where a testator had several daughters who had a claim under marriage articles, and also a claim under the will, and one of the daughters claimed, not only under the latter, but under the articles also, it was held that she must either acquiesce under the will, or renounce all benefit therefrom.

### 2. *What will be sufficient to put a Party to his Election.*

What will be sufficient to put a party to election.

An absolute power of disposition, and an intention to exercise that power, seems in general sufficient to raise an election; therefore, a devise to a testator's heir-at-law, which, prior to the stat. 3 & 4 Will. 4, c. 106, s. 3, would have been inoperative (as the heir, whether disputing or admitting the will, must have taken by descent, and not under the devise), would yet compel him to elect between the devised estate, and claiming adversely to the will, and the estate which descended upon the heir descended subject to this implied condition: (*Noyes* v. *Mordaunt*, 2 Vern. 581; *Whistler* v *Webster*, 2 Ves. 371; *Thelluson* v. *Woodford*, 1 Dow, 249; *Welby* v. *Welby*, 2 Ves. & Bea. 187.) It also appears to be immaterial whether a testator, in disposing of that which is not his own, is aware of the actual situation, or proceeds upon the erroneous supposition that he is exercising a power which actually belongs to him. Still, in order to raise a case of election, the intention must be clearly expressed, for equivocal or ambiguous terms will be insufficient; consequently it has been held that a general devise of real estate is not a sufficient indication of such intent, although the testator has no real estate of his own upon which the will can operate.

Equivocal or ambiguous terms are insufficient to raise an election.

### 3. *What Persons will be bound to elect.*

Heir.

Where lands were attempted to have been devised by a will incapable of passing them on account of its not having been attested pursuant to the Statute of Frauds (29 Car. 2, c. 3, s. 5), the heir claiming a benefit under it with respect to personal estate, as to which it was valid and effectual, would not have been put to his election, unless the will contained an express condition not to dispute its validity: (*Hearle* v. *Greenbank*, 3 Atk. 715; S. C. 1 Ves. sen. 306; *Boughton* v. *Boughton*, 1 Atk. 652; *Whistler* v. *Webster*, 2 Ves. 460; 2 Bro. C. C. 581; *Carey* v. *Askew*, 1 Cox, 241; *Thelluson* v. *Woodford*, 13 *ib.* 223, cited 8 Ves. 492.) This doctrine can now, however, only relate to wills made previously to the year 1838, as the same formalities are required in a will made subsequently to that time to pass the personal, as the real estate; and if incapable of passing the latter description of property, it will be equally ineffectual as to the former: (stat. 1 Vict. c. 26, s. 9.) And no election will arise where a person under twenty-one years of age attempts to make any disposition by will of either his real or personal estate: (1 Vict. c. 26, s. 7.) The doctrine of election, it has been decided, extends to deeds as well as to wills: (*Llewellyn* v. *Mackworth*, Barnardist. 445; *Freke* v. *Barrington* (*Lord*), 3 Bro. C. C. 274; *Chetwynd* v. *Fleetwood*, 1 Bro. P. C. 300; *Moore* v. *Butler*, 2 Sch. & Lef. 249; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Green* v. *Green*, 2 Mer. 86.)

Issue in tail.

Issue in tail also will be put to their election where the entailed estates are devised, and they claim as legatees under the same will: (*Herne* v. *Herne*, 2 Vern. 555; and see 2 Ves. 14, 617.)

Widow.

A widow may be put to her election where she is entitled to dower or a jointure, and is likewise a legatee under her husband's will, and she claims her legacy or her jointure or dower also, in opposition to the will: (*Gosling* v. *Warburton*, Cro. Eliz. 128; Co. Litt. 366; 4 Rep. 4; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Chalmers* v. *Storil*, 2 Ves. & Bea. 222.) She has likewise been put to her election between a devise or bequest and the benefit to be derived from her marriage settlement, and this notwithstanding the will was incapable of passing real property: (*Newman* v. *Newman*, 1 Bro. C. C. 186.) In order, however, to preclude a wife from taking under her husband's will, there must be a plain intent to exclude her; the rule of equity being that a widow cannot be put to an election, except by an express declaration, or necessary inference from the inconsistency of her claim with the dispositions of the will (*Babington* v. *Greenwood*, 1 P. Wms. 533; *French* v. *Davis*, 2 Ves. 577; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452); therefore, if both may stand together, she will not be obliged to elect between them. Hence, a mere gift by the husband to the wife of a larger amount than her dower, will not put her to her election, but she may claim both: (*French* v. *Davis*, 2 Ves. 572; *Brown* v. *Parry*, 2 Dick. 685; *Strahan* v. *Sutton*, 3 Ves. 249.) Nor does a bequest to a wife in bar and satisfaction of her thirds, exclude her right and title as next-of-kin: (*Foster* v. *Cooke*, 3 Bro. C. C. 350; *Middleton* v. *Cater*, 4 *ib.* 409.) Neither does a bequest of the residue of the personal estate (*Ayres* v. *Willis*, 1 Ves. sen. 230; *Thompson* v. *Nelson*, 1 Cox, 44), nor the bequest of an annuity (*id. ib.*), bar her claim to dower. And notwithstanding a testator has given a provision to his wife expressly, in bar of any claim she might have against any other objects of his

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*Of the doctrine of election.*

bounty; yet, if by any accident these objects should be unable to claim the benefit of that exclusion, no other person can set it up against the widow. Hence, where a testator gives his wife real and personal estate in bar of her dower and thirds, and bequeathed the residue to charities, which bequest was void under the statutes of mortmain, it was held that the widow should not be put to her election: (*Pickering* v. *Stamford*, 3 Ves. 332.) Whether a rent-charge given to a widow, issuing out of the lands from which she is dowable, will be sufficient to put her to her election, still remains a doubtful point. Lord Northington (*Arnold* v. *Kempstead*, Amb. 466), Lord Camden (*Villa Real* v. *Galway* (*Lord*), *ib.* 683; 1 Bro. C. C. 682), Sir Thomas Sewell (*Jones* v. *Collier*, Amb. 730), and Mr. Justice Buller (*Wake* v. *Wake*, 3 Bro. C. C. 225), seem to have considered a devise of this kind a satisfaction. But Lord Hardwicke (*Pitt* v. *Snowden*, mentioned 3 Ves. 252), Lord Bathurst (*Davis* v. *Edwards*, mentioned 1 Bro. C. C. 292), Lord Thurlow (*Foster* v. *Cooke*, 3 Bro. C. C. 347), and Lord Alvanley (*French* v. *Davis*, 2 Ves. 278), entertained a directly contrary opinion. Amidst such a variety of conflicting authorities, it is difficult to decide; but the prevailing opinion of the profession appears to be in favour of the wife: (see 1 Mad. Pract. 59, 2nd edit.) And even where a widow is bound to elect, she will, nevertheless, be allowed to ascertain which fund is the most beneficial for her to take; and, therefore, she may file a bill to have the debts and legacies paid, and the funds clearly ascertained: (*Wake* v. *Wake*, 2 Ves. 255.)

Children.

Children also may be put to their election between interests given them by will and benefits which they are entitled to by settlement, when both claims are inconsistent: (*Whistler* v. *Webster*, 3 Ves. 367.) But it seems that children

will not be bound by the election of their parents, where their interests are distinct and separate: (*Ward* v. *Baugh*, 4 Ves. 623.)

Creditors also may be put to their election by a bequest inconsistent with the claim of their debts: (*Graves* v. *Boyle*, 1 Atk. 509.) It must be observed, however, that election is a doctrine inapplicable as to the funds out of which the debts are to be paid. They are payable first out of the personal estate, and if that should prove insufficient for the purpose, the creditors may then resort to any property liable to such payment: (*Kidney* v. *Cousmaker*, 12 Ves. 154.)

### 4. *What Acts will amount to an Election.*

Cases of election must be guided rather by their particular circumstances, than by any fixed rules.

The acts from which an election must be implied, must be decided rather by the particular circumstances of each individual case, than upon any general or fixed principle: (*Ardsoife* v. *Bennett*, 2 Dick. 463; *Wilson* v. *Townsend*, 2 Ves. 693; *Bor* v. *Bor*, 3 Bro. P. C. 167; *Northumberland* (*Earl of*) v. *Aylesford* (*Earl of*), Amb. 540; *Wake* v. *Wake*, 1 Ves. 335; *Butricke* v. *Brodhurst*, 3 Bro. C. C. 88; *Rumbold* v. *Rumbold*, 3 Ves. 65; *Simpson* v. *Vicars*, 14 *ib.* 341; *Welby* v. *Welby*, 2 Ves. & Bea. 187, 200; *Stratford* v. *Powell*, 1 Ball & B. 1.) If the question of election is doubtful, it may be sent to a jury: (*Roundell* v. *Currer*, 2 Bro. C. C. 67.)

Election how far compulsory.

Election may be compelled on the part of an adult, by a direction or a decree on the original hearing, that if he neglects or refuses to signify his election within some given time (six months, for instance), he shall be understood as having elected to take his paramount rights: (*Streatfield* v. *Streatfield*, Ca. temp. Talb. 176.) If a person is under restraint and cannot elect, his claim must be barred as long as his disability continues: (*Wilson* v. *Lord John Townsend*, 2 Ves. 697.)

Where, however, the devisee is an infant, or a *feme covert*, the usual practice, if there be any doubt upon the matter, is to refer it to the Master to say which is most for their benefit, taking under, or against the will. (*Ib. id.*) Still it seems that where an infant is an heir, he will be allowed until he comes of age to elect: (*Boughton* v. *Boughton*, 2 Ves. sen. 15.) The party bound to elect is also entitled first of all to ascertain the value of the funds (*Hender* v. *Rose*, 3 P. Wms. 124, n.; *Pusey* v. *Desbouverie*, *ib.* 315; *Boynton* v. *Boynton*, 1 Bro. C. C. 445; *Butricke* v. *Brodhurst*, 3 *ib.* 88; *Wake* v. *Wake*, *ib.* 255; *Chalmers* v. *Storil*, 3 Ves. & Bea. 222); and for that purpose may sustain a bill in equity to have all the necessary accounts taken; and an election made under a misconception of the extent of claims on the fund is not conclusive: (*Kidney* v. *Cousmaker*, 12 Ves. 136.)

5. *Application of the devised Property when the Party put to his Election chooses to take in Opposition to the Will.*

Interest devised by the will shall be applied in compensation to the disappointed devisee, when the party elects to take in opposition to the will.

When the party elects to take in opposition to the will, the interest given him by such will, will be applied in compensation to the disappointed devisee: (*Anon.* Gilb. Eq. Rep. 15; *Ward* v. *Baugh*, 4 Ves. 623.) But the estate thus taken in opposition to the will vests in the party, with all the legal consequences attached to it. Hence, where a tenant in tail devised away the entailed estate, and gave the issue in tail, who was a married woman, and also her husband, other benefits by his will, and she elected to take her estate tail, but her husband took under the will, some time after which the wife died, upon which he entered as tenant by the curtesy, when it was contended that as he took under the will he could not claim in opposition to it; but it

was, nevertheless, ruled that the wife took the estate tail with all its legal incidents, and that, consequently, her husband upon surviving her became entitled to be tenant by the curtesy in right of her seisin, notwithstanding that he claimed in his own right under the will: (*Cavan* (*Lady*) v. *Pulteney*, 2 Ves. 544; 3 *ib.* 384; and see *Brodie* v. *Barry*, 2 Ves. & Bea. 127.)

## SECTION VIII.

### OF RESULTING TRUSTS.

1. *What will be sufficient to raise a Resulting Trust.*
2. *As to Admissibility of Parol Evidence.*
3. *As to Purchases made with Trust Moneys.*
4. *As to Unappropriated Funds.*

### 1. *What will be sufficient to raise a Resulting Trust.*

Where conveyance is taken in the name of a third party, trust will result in favour of the party paying the purchase money.

It will be proper in this place to offer a few remarks upon the doctrine of resulting trusts. These do not arise from direct words of limitation, but by operation of law from the evident and implied intention of the parties. (Cru. Dig. 421.) As where a conveyance is taken in the name of one person, and another pays the purchase money, in which case an implied or resulting trust will arise in favour of the latter party, who, in the eye of a court of equity, will be considered as the rightful owner of the property; and this, whether the purchase be taken in the name of the purchaser and others jointly, or whether in one name, or in the names of several: (*Anon.* 2 Ventr. 631; *Dyer* v. *Dyer*, 2 Cha. Cas. 108: *Gascoigne* v. *Thwing*, 1 Vern. 366; *Acherley* v. *Vernon*, 1 Cha. Cas. 39; *Willis* v. *Willis*, 2 Atk. 71; *Lloyd* v. *Spillett*, *ib.* 150; *Ripley* v. *Waterworth*, 7 Ves. 425.) And the construction will be the same in the case of a purchase of leasehold and copyhold property, as in the case

of freeholds. This species of trust being also exempted out of the Statute of Frauds (29 Car. 2, c. 3, s. 8), will equally result in favour of the person advancing the money, although no declaration of trust should ever be made by the person in whose name the conveyance is taken : (*Hungate* v. *Hungate*, Toth. 184 ; *Anon.* 2 Ventr. 361, n. 3 ; *Gasgoine* v. *Thwing*, 1 Vern. 366 ; *Ambrose* v. *Ambrose*, 1 P. Wms. 321 ; *Ex parte Vernon*, 2 *ib.* 549 ; *Smith* v. *Baker*, 1 Atk. 385 ; *Lloyd* v. *Spillett*, 2 *ib.* 148 ; *Withers* v. *Withers*, Amb. 15 ; *Lade* v. *Lade*, 1 Wils. 21 ; *O'Hara* v. *O'Neil*, 2 Bro. C. C. 39 ; *Smith* v. *Camelford* (*Lord*), 2 Ves. 713 ; *Rider* v. *Kidder*, 10 Ves. 360 ; *Wray* v. *Steele*, 2 Ves. & Bea. 388.)

### 2. *Parol Evidence admissible in the case of Resulting Trusts.*

Parol evidence, how far admissible.

In the case of a resulting trust, parol evidence will be admitted to explain the nature of the transaction, though it seems doubtful if it would be admitted against an answer of a trustee denying the trust altogether : (*Skett* v. *Whitmore*, 2 Freem. 289 ; *Newton* v. *Preston*, Pre. Cha. 103 ; *Cottington* v. *Fletcher*, 2 Atk. 155; *Bartlett* v. *Pickersgill*, 4 East, 577.) But where the trust is confessed in the answer (*Hampton* v. *Spencer*, 2 Vern. 288 ; *Cottington* v. *Fletcher*, 2 Atk. 155), or by any note, memorandum, or letter, or by any writing in the shape of mutual covenants, or agreements, although not under seal, or stamp, it will be sufficient : (*Ambrose* v. *Ambrose*, 1 P. Wms. 322 ; *Bellamy* v. *Burron*, Ca. temp. Talb. 97 ; *Ryall* v. *Ryall*, 1 Atk. 59 ; *Lane* v. *Dighton*, Amb. 409; *Crook* v. *Brooking*, 2 Vern. 106 ; *Legard* v. *Hodges*, 3 Bro. C. C. 53 ; *Hodges* v. *Lloyd*, 2 *ib.* 534.)

### 3. *As to Purchases made with Trust Moneys.*

Trust moneys may be followed into the land in which they are invested.

In the case also of purchases with trust moneys, a trust will result for the owner of the money. It was, indeed, formerly said, that as money has no ear-mark, equity could not follow it into the land in which a trustee had invested it, unless the latter owned, by deed, that he had so laid it out: (*Kirk* v. *Webb*, Pre. Cha. 84; *Halcott* v. *Markant*, *ib.* 168; *Deg* v. *Deg*, 2 P. Wms. 414.) But whatever doubt may once have existed upon this matter, it is now clearly settled, that where a trustee lays out the trust-money in the purchase of landed property, the money may be followed into the land in which it is so invested; and that claims of this nature, like other resulting trusts, may be supported by parol evidence: (*Keech* v. *Sandford*, Sel. Cas. in Cha. 61; *Holt* v. *Holt*, 1 Cha. Cas. 191; *Pierson* v. *Shore*, 1 Atk. 480; *Abney* v. *Miller*, 2 *ib.* 597; *Edwards* v. *Lewis*, 3 *ib.* 538; *Ex parte Bennett*, 10 Ves. 395; *Lench* v. *Lench*, *ib.* 517; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.)

### 4. *As to Unappropriated Funds.*

What persons are entitled to unappropriated funds.

In the case of wills, where real or personal estate is devised or bequeathed for certain specified purposes, and there is no residuary devise or bequest, the unappropriated part of the real estate, or the proceeds thereof, will belong to the testator's heirs (*Randall* v. *Booky*, 2 Vern. 405; *City of London* v. *Garraway*, *ib.* 571; *Hobart* v. *Suffolk*, *ib.* 694; *Anon.* 1 Com. 345; *Wych* v. *Packington*, 3 Bro. P. C. 44; *Starkey* v. *Brookes*, 1 P. Wms. 390; *Emblyn* v. *Freeman*, Pre. Cha. 541; *Buggins* v. *Yates*, 9 Mod. 362; *Hill* v. *Bishop of London*, 1 Atk. 618; *Hopkins* v. *Hopkins*, 1 Ves. sen. 268; *Sheldon* v. *Barnes*, 2 *ib.*

447; *Collins* v. *Wakeman*, *ib.* 683; *Attorney-General* v. *Bowyer*, *ib.* 325; *Wilson* v. *Major*, 11 *ib.* 203; *Gibbs* v. *Ongier*, 12 *ib.* 416; *Wright* v. *Wright*, 16 *ib.* 188; *Williams* v. *Code*, *ib.* 500; *Kellett* v. *Kellett*, 1 Ball & B. 533; *Hooper* v. *Goodwyn*, 18 Ves. 156; *King* v. *Dennison*, 1 Ves. & Bea. 260, 272; *Maughan* v. *Mason*, 1 Ves. & B. 410; *Dunnage* v. *White*, 1 Jac. & Walk. 593; *Jones* v. *Michell*, 1 Sim. & Stu. 290); and the unappropriated residue of the personal estate, to the testator's next-of-kin: (*Dicks* v. *Lambert*, 4 Ves. 725; *Dawson* v. *Clarke*, 15 *ib.* 416; *Mence* v. *Mence*, 18 *ib.* 348.) And if estates are conveyed for particular purposes, which either wholly, or partially fail of effect, then to the extent of such total (Pre. Cha. 162, 541; *Digby* v. *Legard*, 3 P. Wms. 22; *Gravenor* v. *Hallum*, Amb. 642; *Ackroyd* v. *Simpson*, 1 Bro. C. C. 503), or partial failure (*Lloyd* v. *Spillett*, 2 Atk. 150; *Davidson* v. *Foley*, 2 Bro. C. C. 102; *Habergham* v. *Vincent*, 2 Ves. 204; *Sidney* v. *Shelley*, 19 *ib.* 352), as the case may be, a trust will result back to the original owner.

Purchases by parent in the name of child.

The subject of purchases by a father in the name of a wife or child, and whether such will be considered as an advancement for the party in whose name the purchase is taken, or a resulting trust for the husband, or father, having been already treated of in a former part of this work (see *ante*, pp. 224—227), will render a repetition here unnecessary.

## SECTION IX.

### AS TO ILLUSORY APPOINTMENTS.

1. *What Appointments would have been considered as illusory.*
2. *Recent Enactments respecting.*

### 1. *What Appointments would have been considered as illusory.*

How far equity would have interfered in the case of illusory appointments.

Where a power of appointment can only be exercised in favour of particular individuals, as where a parent has a power to appoint in favour of his children, he cannot appoint to any one or more of these, to the utter exclusion of the rest; but then, as he has the power of distributing the amount of the shares, the same object may in a great measure be attained by appointing a very small portion to those he intends to exclude, and appointing the bulk amongst those he is desirous of favouring. It is true that equity very early interfered in the case of illusory appointments (*Astry* v. *Astry*, Pre. Cha. 256, 355; *Wall* v. *Thurbane*, 1 Vern. 414; *Thomas* v. *Thomas*, 2 *ib.* 513; *Civil* v. *Rich*, 1 Cha. Cas. 110; *Clarke* v. *Turner*, 2 Freem. 198; *Menzey* v. *Walker*, Forrest, 72; *Maddison* v. *Andrews*, 1 Ves. sen. 59; *Alexander* v. *Alexander*, 2 *ib.* 640; *Pocklington* v. *Bayne*, 1 Bro. C. C. 450; *Boyle* v. *Peterborough* (*Bishop of*), 1 Ves. 310); but it was not long before that court felt extremely

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puzzled to decide what appointments should be so considered, with reference to the amount of the fund, and of the objects amongst whom it was to be distributed. And in *Butcher* v. *Butcher* (9 Ves. 393) Sir William Grant, Master of the Rolls, remarked that, "to say, under such a power, an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than establish a rule. What is an illusory share? and what is a substantial share? Is it to be judged upon by a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given to exclude the interference of the court? What is the limit of amount at which it ceases to be illusory, and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of the share, that would belong to each upon an equal division?" From what can be collected out of the various cases upon which these questions have from time to time arisen in courts of equity, it appears that the appointment of a twenty-fifth share (*Butcher* v. *Butcher*, 9 Ves. 382), or even of one seventy-fifth share of the whole fund, will not be deemed illusory: (*Mocatta* v. *Lousada*, 12 Ves. 123; *Dyke* v. *Sylvester*, 12 Ves. 126.)

### 2. *Recent Enactments respecting.*

*Any appointment, however trifling, would have been valid at law.*

At law, indeed, the appointment of any share, however small, as a shilling for instance, would have been considered as a good execution of the power (*Gibson* v. *Kinvern*, 1 Vern. 67; 1 T. R. 438, n.; *Morgan* v. *Surman*, 1 Taunt. 289); and Sir Wm. Grant said, in *Butcher* v. *Butcher*, before alluded to, that he could not understand how the question whether a power is well or ill exe-

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cuted could receive different determinations in different courts. "If," he said, "it is not executed according to its true import, how can a court of law say it is well executed? and if it is executed according to its true import, how can a court of equity say it is ill executed?" (9 Ves. 394.) And now, as all equitable interference in the case of illusory appointments is taken away by the stat. 1 Will. 4, c. 46, it seems that the same rules will prevail in equity as at law with respect to future appointments. By that statute it is enacted that no appointment which from and after the passing of that act shall be made in the exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed, or left unappointed, to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power: (sect. 1.)

No appointment will now be void on account of being illusory by stat. 1 Will. 4, c. 46.

The 2nd section, however, provides that nothing in the act shall affect any provision in any deed or other instrument creating any such power, which shall declare the amount of the share. And the 3rd section provides that the act shall not give any other force to any appointment, than such appointment would have had, if a substantial share of the property affected by the power had been thereby appointed, or left unappointed, to devolve upon any object of such power.

Act not to affect any provision in instrument creating the power that declares the amount of the share.

## SECTION X.

### EFFECT OF NEW WILL ACT UPON GENERAL DEVISES OF REAL PROPERTY.

1. *As to Estates acquired subsequently to the Will.*
2. *As to lapsed Devises.*

### 1. *As to Estates acquired subsequently to the Will.*

Effect of late Will Act upon general devises of real property.

BEFORE dismissing this part of my subject, it may be proper to offer a few remarks upon the alterations effected by the new Will Act (stat. 1 Vict. c. 26, s. 3), upon general devises of real property. Before that act came into operation (1st Jan. 1838), the testator must have been seised of the devised lands at the time of making his will, and at his death, otherwise the lands could not have passed. If, therefore, he had been disseised before the execution of his will, that property could not have passed, for want of seisin in the testator at the time of making it: (Bro. Abr. tit. Dev. 15; *Goodright* v. *Forrester*, 8 East, 552; *Doe dem. Souter* v. *Hale*, 2 Dow. & Ry. 38.) But if he had been in possession at the time of making his will, and was afterwards disseised, yet if he re-entered and died seised thereof, then he would have been remitted

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of his old title, and his testamentary power would have been restored: (*Bunter* v. *Coke*, Salk. 237; *Attorney-General* v. *Vigor*, 8 Ves. 282.) Neither could any one have devised a mere right, as a reversion discontinued, or a right of entry for a breach of a condition: (*Baker* v. *Hacking*, Cro. Car. 387; *Goodright* v. *Forrester*, *supra*, and 1 Taunt. 578.) Nor could a will, however comprehensible in its terms, have passed subsequently acquired property (*Bunter* v. *Coke*, Salk. 237); a rule which applied as well to copyhold as to freehold estates: (*Harris* v. *Cutler*, cited 1 T. R. 438, n.; *Spring dem. Titcher* v. *Biles*, 1 T. R. 435, n.)

Wills made subsequently to 1838 speak from the time of the testator's death.

But as to wills within the operation of the act under discussion, the will speaks from the time of the testator's death, and not as formerly from the time at which it was made, unless a contrary intention shall appear by the will, and comprehends all the real and personal estate the testator is entitled to, either at law or in equity, at the time of his death, and which, if not devised or bequeathed, or disposed of, would devolve upon his heir-at-law, including all rights of entry for condition broken, and other rights of entry, and also to such and the same estates, interests, and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will: (sect. 3.)

Where the intention is contrary to the wills speaking from tue death, that intention will be allowed to prevail.

But if a contrary intention appears on the will, then such intention will be allowed to prevail. Thus, where a testator, providing for his widow, gave all his property to his nephews, which he expressed to be "all and singular the residue and remainder of my messuages, farms, &c., as are *now* vested in me, *or, as to the leaseholds, shall be vested in me at the time of my death*," the testator had acquired property subsequent

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to the date of his will, and the question therefore was, whether such property would pass to the nephews. Sir L. Shadwell, V.-C., said, the main question appeared to be this, viz., whether the contrary intention, referred to in the act, appeared upon this present will, since, if it did not, the general words were sufficient to embrace the subsequently acquired property, and pass it to the nephews. The words were, "whereof I am now seised or possessed;" and the point in issue was, whether those words did not by themselves mark the distinction, and whether it was not clear, by the construction which the testator had himself put upon the words, "whereof I am now seised or possessed," he did not in reality mean the estates, tenements, hereditaments, &c., which he had on the very day he was making his will. That it was sufficiently evident, in the subsequent clause of the will, that the testator had intended to make a distinction between the expression "now," and a future time. His Honour thought that the testator had himself put a construction upon the words he had used, and that it was his intention to pass only those estates of inheritance of which he was seised or possessed on the very day on which he made his will: (*Cole* v. *Scott*, June 14, 1848, 11 L. T. 306.)

New Will Act does not extend to wills made previously to 1838.

It must also be borne in mind that the act does not extend to any will made before the 1st day of January, 1838; consequently, as to wills made previously, the old law still prevails: (sect. 34.)

### 2. *As to lapsed Devises.*

Operation of late Will Act upon lapsed devises.

Under this act also, unless a contrary intention appears upon the face of the will, a devise which fails of effect by reason of the death of the devisee in the testator's lifetime, or by reason of

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such devise being contrary to law, or otherwise incapable of taking effect, will now fall into the residue, if any, contained in the will (ss. 24, 25), instead of descending on the testator's heir-at-law, as it would previously have done, on account of the will then speaking only from the time at which it was made: (*Bunter* v. *Cooke*, Rep. temp. Holt, 246; Salk. 237; *Wright* v. *Hall*, For. 182; S. C. by the name of *Wright* v. *Horne*, 8 Mod. 224; *Roe* v. *Fludd*, For. 184; *Howe* v. *Dartmouth* (*Earl of*), 7 Ves. 150; *Broome* v. *Monck*, 10 *ib.* 605; *Hill* v. *Cock*, 1 Ves. & Bea. 175.)

## SECTION XI.

### EFFECT OF SUBSEQUENT CONVEYANCES ON PRE-EXISTING WILL.

1. *Old Law respecting.*
2. *Effect produced by recent Enactments.*

### 1. *Old Law respecting.*

Effect of subsequent conveyances on pre-existing will.

As the law stood formerly (and so it still remains with respect to the wills made previously to the year 1838), if a man conveyed away his lands to another, it was a revocation of a will made previously; nor would it have been revived even if the property had been afterwards reconveyed to him; in which respect it differed from a disseisin, where, as I have already noticed, if the disseisor re-entered, he was again remitted to his former estate: (*ante*, pp. 393, 394.) But, in the case of subsequent conveyances, the rule was so strictly adhered to, that even an alienation to a trustee, without any intention whatever of parting with the fee, and notwithstanding the devisor took back his old use, would have effected a total revocation of a prior will. This construction arose from the legal consequence, that the subject-matter upon which the will was to operate being withdrawn, the devise necessarily became inoperative; and the subsequent re-acquisition of the property by re-conveyance, or even through the instantaneous operation of the Statute of Uses

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being considered in the light of a new purchase, was, as the law then stood, incapable of being comprehended in a will made previously: (*Hussey's case*, Moore, 789; *Lord Lincoln's case*, 1 Eq. Ca. Abr. 411, pl. 11; Show. Parl. Cas. 154; *Pollen* v. *Huband*, 1 Eq. Ca. Ab. 412; S. C. in D. P. by the name of *Huband* v. *Huband*, 7 Bro. P. C. 433; *Parson* v. *Freeman*, 3 Ves. 308; *Sparrow* v. *Hardcastle*, 3 Atk. 798; *Goodtitle* v. *Otway*, 2 H. Black. 516; 1 Bos. & Pull. 576; 7 T. R. 399; S. C. in equity, by the name of *Cave* v. *Holford*, 2 Ves. 597, n.; 3 *ib.* 650; *Bridges* v. *Chandos* (*Duchess of*), 2 Ves. 429; *Dilnot* v. *Dilnot*, 2 Bos. & Pull. N. R. 201; *Vawser* v. *Jeffery*, 16 Ves. 519; 2 Swanst. 286.) And the rule is the same with regard to equitable as to legal estates, where a testator does any act to alter the nature of the trusts: (*Lord Lincoln's case*, 1 Eq. Ca. Abr. 411, pl. 11.) It extends also to estates which lie in grant, as well as to those which lie in livery: (*Sparrow* v. *Hardcastle*, 3 Atk. 799.) Nor would the circumstance that the conveyance was necessary to confer a testamentary power of disposition over the property, as where a tenant in tail made a conveyance to the tenant to the *precipe*, for the purpose of suffering a recovery, have varied the strictness of this rule: (see *Marwood* v. *Turner*, 3 P. Wms. 163.) And even if a man seised in fee, and thinking that he had only an estate tail, had suffered a recovery for the express purpose of confirming his will, it would have had the effect of revoking it altogether: (*Sparrow* v. *Hardcastle*, 3 Atk. 799.)

What assurances only operate as a revocation *pro tanto* in equity.

But mortgages in fee, although an absolute revocation at law, will in equity only amount to a revocation to the extent of the charge on the property; for, in the eye of a court of equity, mortgages are considered rather as securities for money than actual conveyances of real property,

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the beneficial interest of which goes to the executors for whom the heir of the mortgagee is only a trustee; they support no dower, and have no one property of a real estate: (*Hall* v. *Dench*, 1 Vern. 329; *Peach* v. *Phillips*, Dick. 538; *Baxter* v. *Dyer*, 5 Ves. 656.) Conveyances in trust for the payment of debts also, although a revocation at law, have only been considered in equity as a revocation *pro tanto*, *i. e.* to the extent of the amount charged, and no further: (*Vernon* v. *Jones*, Pre. Cha. 32; 2 Vern. 241; 1 Eq. Ca. Abr. 410; 2 Freem. 17.)

Constructive conversion from real to personal estate, would have effected a total revocation.

But if in such conveyances there appeared any intention that the surplus was to have been treated as personal estate, as where there was a direction to pay the surplus to executors, this would have amounted to a constructive conversion of the real into personal property, and thus have left nothing in the former shape upon which the will could have operated: (2 Ves. 436.) And if the lands themselves had been devised upon trust for the payment of debts, a subsequent conveyance upon the same trusts would have revoked the will, upon the ground that the conveyance was inconsistent with the devise: (2 Cha. Cas. 115.)

Conveyance for the simple purpose of partition would not have revoked a prior will.

Another exception to the above rule was a conveyance by a tenant in common, or a coparcener, for the purpose of effecting a partition, which, if the sole object of such conveyance, would not have revoked a prior will, even if a fine had been levied for the purpose of perfecting the assurance: (*Temple* v. *Webb*, Vin. Abr. tit. Dev. R. 6, pl. 6; Freem. 442, pl. 735; *Luther* v. *Kidley*, Vin. Abr. tit. Dev. R. 6, pl. 30; 3 P. Wms. 169, n. B.)

*Aliter* if new uses were declared.

But where anything was contemplated beyond the simple act of partition, as where a power of appointment was reserved, the rule above laid down would have become applicable, and thus the subsequent conveyance would have revoked the prior will: (*Tickner* v. *Tickner*, cited in

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*Parsons* v. *Freeman*, 3 Atk. 742 ; *Brydges* v. *Chandos* (*Duchess of*), 249; see also 7 Ves. 564; 8 Ves. 281.)

Rule as to partition has no application as between tenants in common.

But the rule as to partition only extended to tenants in common and coparceners, for joint tenants are under a legal incapacity to devise the estates of which they are so seised; the will of a joint tenant is therefore merely void as to the joint property, so that, even if the jointure had been severed, the will could have had no effect without being republished; when in fact it would have become, to all intents and purposes, a perfectly new will: (*Swift* v. *Roberts*, 3 Burr. 1488; Ambl. 617.)

Surrender of copyholds, no revocation of a prior will.

Copyhold estates do not fall within the above rule; consequently, a surrender of copyholds is no revocation of a prior will, except so far as may be inconsistent with the dispositions contained in such will, to which extent it will be either *in toto*, or *pro tanto*, a revocation: (*Vawser* v. *Jeffery*, 3 B. & Ald. 462; 2 Swanst. 268.)

Leases, or mortgages for years, only a revocation *pro tanto*.

A lease for years, or a mortgage for a term, was merely a revocation *pro tanto* even at law, and would only have defeated the devise to the extent of the estate or interest so granted: (*Hodgkinson* v. *Wood*, Cro. Car. 23 ; *Montague* v. *Jefferies*, 1 Roll. Abr. 616; *Lamb* v. *Parker*, 2 Vern. 495.)

Simple acquisition of the legal estate, would not have revoked a will devising the equitable interest.

Neither, generally speaking, would the acquisition of the legal estate, where the testator had a previous equitable interest in the property, have been considered in the light of a new purchase of that nature as to revoke a prior will (1 Roll. Abr. 616, pl. 3; *Rawlins* v. *Burgis*, 2 Ves. & Bea. 385); as where a person, having contracted to purchase an estate, afterwards made his will, subsequently to which the legal estate was conveyed to him: (*Watts* v. *Fullerton*, stated 2 Ves. 602; *Gibbons* v. *Pott*, Doug. 710.) But in a case of this kind, as in the case of partitions just

*Aliter*, if conveyed to dower uses.

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before alluded to, the legal estate must have been conveyed to him as a simple estate in fee; for if conveyed to dower uses, the assurance would then have been considered as something more than merely clothing the equitable with the legal estate, and thus have brought the case within the legal operation of the rule: (*Parsons* v. *Freeman*, 3 Atk. 741; *Rawlins* v. *Burgis*, 2 Ves. & Bea. 382; *Ward* v. *Moore*, 4 Mad. 368.)

Mere change of trustees no revocation.

It appears that the mere change of trustees of the legal estate would not have revoked a prior disposition of the equitable interest, even although the owner of such equitable interest should have concurred in the conveyance: (*Dark* v. *Zouch*, 1 Cha. Rep. 23.)

Whether imperfect conveyances would have effected a revocation.

It appears formerly to have been considered, that a conveyance, although ineffectual for the purpose for which it was made, as a feoffment without livery, or a bargain and sale without enrolment, would nevertheless have had the effect of revoking a prior will: (1 Roll. Abr. 615; Went. Exors. 22; Gilb. Dev. 95; *Shove* v. *Pincke*, 5 T. R. 124.) But this doctrine has been very properly overruled by more recent decisions (*Mathews* v. *Venables*, 2 Bing. 136; *Eilbeck* v. *Wood*, 1 Russ. 564); for the principle of those cases in which an effectual conveyance revokes a prior will, by taking away the subject-matter upon which the devise was to operate, has no application to inoperative assurances, which leave the property in precisely the same state it was before, and the owner's interest therein in no way affected by them.

Deed obtained by fraud or compulsion no revocation.

It appears that, where a deed has been obtained by fraud or compulsion, it will not be allowed to operate as a revocation of a will made previously; or, at any rate, it will not be allowed to have that operation in equity; and in *Hawes* v. *Wyatt* (3 Bro. C. C. 156), Lord Thurlow said that the reason against admitting such an instrument to

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have the effect of revocation was strong in that court; since, when application is made to the proper party, it will be ordered to be delivered up; and when a deed is ordered to be delivered up, it is implicitly declared to be no deed.

How far a contract to sell will effect a revocation.

If a person, after making his will, had entered into a contract for the sale of the devised property, or a covenant to settle the same, and the contract or covenant was such as a court of equity would decree the specific performance of, it would have amounted to an equitable revocation of a will made previously: (*Montague* v. *Jeffries*, 1 Roll. Abr. 615, pl. 3; *Ryder* v. *Wager*, 2 P. Wms. 328; *Cotter* v. *Layer*, *ib.* 622; *Rawlins* v. *Burgis*, 2 Ves. & Bea. 385.) But it seems it would have been otherwise, if the agreement or covenant was such that the court would not carry into execution. Whether the abandonment of an agreement which operated as an equitable revocation could have again set up the will, though the question has been more than once raised, is still an undecided point (*Knollys* v. *Alcock*, 7 Ves. 558; *Bennett* v. *Tankerville* (*Earl of*), 19 Ves. 170); but the better opinion seems to be, that the abandonment of the contract in the testator's lifetime would not have set up the will; and if it remain unrescinded during the testator's lifetime, it is quite clear that its subsequent abandonment would not have had that operation: (*Bennett* v. *Tankerville* (*Earl of*), *supra.*)

Conveyance to a devisee, how far a revocation.

If a testator, after devising property to any one, were afterwards by deed to grant him any lesser interest than that devised to him by the will, if such interest were limited to take effect either presently, or futurely in the lifetime of the testator, it would have been no revocation; but if such interest had not been to take effect until after the testator's death, the inconsistency of the two dispositions would have raised an im-

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plication that the first, which was by will, was intended to be revoked: (*Cook* v. *Bullock*, Cro. Jac. 49.) It has, indeed, been said, that the act of executing a mortgage to a devisee who has advanced money on the devised property, will effect a revocation of the previous devise, on the ground of the inconsistency of the two dispositions; and that in this respect there is a distinction between a mortgage made to a stranger, which is universally admitted to be a revocation *pro tanto*, and a mortgage made to the devisee himself: (5 Barton's Elements, 247; Jarm. Pow. Dev. 557; but see Mr. Jarman's note, 8 *ib.*) The only case which, it seems, has ever been cited or referred to in support of this untenable doctrine, is *Harkness* v. *Bayley* (Pre. Cha. 515), which, if it ever established the distinction above alluded to, and which it seems it never did, has been completely overruled by more recent decisions: (*Peach* v. *Phillips*, Dick. 538; *Baxter* v. *Dyer*, 5 Ves. 656.) Lord Loughborough, in fact, in *Baxter* v. *Dyer* (*supra*) denied, in express terms, that any such distinction had ever been made in the case of *Harkness* v. *Bayley*, in which he himself had been engaged as counsel, and which he said had been misreported, and from a note made by him, which he produced, it appeared to have been decided on the ground of inconsistency between the will and the subsequent acts of the party; by which it evidently appeared that the mortgagor intended the estate to descend to his heir-at-law.

### 2. *Effect produced by recent Enactments.*

Operation of the late Will Act with respect to revocation by subsequent conveyances.

Thus stands the law with respect to the revocation of wills by subsequent conveyances of testators who have died previously to the 1st of January, 1838, but with respect to the wills of those who have or shall die subsequently, the

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23rd section of the stat. 1 Vict. c. 26, enacts, that no conveyance, or other act, made or done subsequently to the execution of a will relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as therein aforesaid, shall prevent the operation of the will, with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

How a will may be revoked by the alteration of circumstances in a testator's family.

Previously to the late Will Act, a will would have been revoked by the testator's subsequent marriage, and the birth of a child, which would have been considered to make such a change in his circumstances, as necessarily to have caused the revocation of a will made previously to the occurrence of such important events: (Shep. Touch. 410; Swinb. 565; *Brown* v. *Thompson*, 1 Eq. Ca. Abr. 413, pl. 11; *Overbury* v. *Overbury*, 2 Show. 242; *Lugg* v. *Lugg*, 2 Salk. 592; S. C. 1 Lord Raym. 441; *Cook* v. *Oakley*, 1 P. Wms. 304; *Christopher* v. *Christopher*, Dick. 445; *Willington* v. *Willington*, 2 Burr. 2165; *Doe* v. *Lancashire*, 5 T. R. 49; *Sheath* v. *York*, 1 Ves. & Bea. 390.)

The act of marriage, or the subsequent birth of children, taken singly, would not have effected a revocation.

But notwithstanding that marriage, and the subsequent birth of children, would have revoked a man's will, yet neither of those circumstances, taken singly, would have had that effect; therefore, a will made after marriage would not have been revoked by the subsequent birth of a posthumous child: (*Doe* v. *Barford*, 4 Mau. & Selw. 11.) And if a testator had children at the time of making his will, one of whom was his heir apparent, his subsequent marriage, and birth of children, would not have operated as a revocation, as that would have had the effect of overturning the will in favour of the subsequently born children, who, if the heir were let in, as he must have been by the revo-

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cation, could have received no benefit whatever from that circumstance: (*Sheath* v. *York*, 1 Ves. & Bea. 390.) Neither, it seems, would the rule above laid down have applied where the wife and children were provided for by the will; for in such case the presumption of revocation would have been rebutted, as it would then have been impossible to say that the testator did not, when he made his will, contemplate such an alteration in his circumstances: (*Kenebal* v. *Scrafton*, 2 East, 530.) It has never, however, been positively decided, whether, if a testator had more children born after the date of his will, and, becoming a widower, married again, and had no children by his second wife, his will would have been revoked; but the better opinion seems to have been that it would have been: (*Gibbons* v. *Caunt*, 4 Ves. 489.) Marriage alone would have revoked a woman's will, nor would it have been revived even if she had survived her husband: (Shep. Touch. 410; Swin. 145; *Forse* v. *Hembling*, 4 Rep. 61; *Lewis's case*, 4 Burn. E. L. 51; *Doe* v. *Staple*, 2 T. R. 695.) For if the change of family circumstances is such as to cause a revocation, a will affected thereby will not be revived by their removal; and for the same cause a will revoked by marriage, and the subsequent birth of a child, would not have been revived, notwithstanding the child or its mother, or both of them, had died in the testator's lifetime: (*Sullivan* v. *Sullivan*, cited 1 Phill. 343; *Emerson* v. *Boville*, 1 Phill. 342.)

Operation of the new Will Act with respect to the revocation of wills by the alteration of testator's family circumstances.

The new Will Act (1 Vict. c. 26), however, provides, that no will shall for the future, be revoked by any presumption on the ground of an alteration in circumstances: (sect. 19.) But it previously enacts, that marriage alone shall be sufficient to revoke a will (sect. 18); so that now a will, whether made by man, or woman, will be equally revoked by their afterwards entering into

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matrimony. Whenever, therefore, a will occurs in a title, it will be the duty of the purchaser's solicitor, in case the testator died previously to 1838, to inquire into the state of his family, in order to discover whether, after he had made his will, he married and had children. If he died subsequently to 1838, a similar inquiry should be made, in order to ascertain whether or not a marriage took place subsequently to the publication of his will.

Statute silent as to subsequent birth of children.

Nothing is said in the act (1 Vict. c. 26) about the subsequent birth of children; consequently, if a testator was married, but childless, at the time of making his will, the circumstance of having children afterwards would not in any way affect the will, so that, as to wills made after 1838, it will be quite sufficient to restrict the inquiry to the subject of marriage only. The inquiry, however, will be as necessary in the case of bequests of leasehold property, as in a devise of freeholds, for the doctrine above laid down will apply to both descriptions of property: (*Emerson* v. *Boville*, 1 Phill. E. R. 339 ; *Holloway* v. *Clarke*, *ib.* 342 ; *Sullivan* v. *Sullivan*, cited *ib.* 343 ; *Talbot* v. *Talbot*, 1 Hagg. 707; *Gibbens* v. *Cross*, 2 Add. 455.)

## SECTION XII.

### OF THE DOCTRINE OF MERGER.

In investigating a title, the subject of merger sometimes becomes of very important consideration. This doctrine is founded upon the principle, that whenever a greater and a lesser estate coincide in the same person, without any intermediate estate, the lesser is immediately annihilated, or, as it is termed in technical language, merged in the greater: (Bro. Surrender, pl. 32; 4 Leon. 37; 2 Black. Com. 177.) Consequently, estates for years, when derived out of a larger term for years, may merge in each other; and these, whatever may be the extent of their duration, will merge in an estate for life, and an estate for life in an estate of inheritance, whether in fee tail or fee simple. The operation of merger, therefore, is to absorb or swallow up the lesser estate, not to enlarge the greater one, which continues precisely the same in quality and extent as it was before. In order, however, that a merger may take place, the larger estate must be the most remote one; hence, though an estate for years will merge in a more remote estate for life, yet if an estate for life be limited to one, with remainder to him for years, or where one who has an estate for life purchases a long term of years in the same property, the term will not become merged in the freehold because the estate for life, notwithstanding it is the larger estate in contemplation of law, is the preceding estate.

When estates for years will merge in each other.

An intermediate estate in a third party will Interme-

diate estate will prevent merger.

also prevent a merger; as where lands are limited to A. for life, or years; remainder to B. for life; remainder to A. in fee; in which case B.'s intervening estate will prevent the two estates from coinciding together, and thus no merger will take place: (*Duncombe* v. *Duncombe*, 3 Lev. 437; *Bate's case*, 1 Salk. 254; *Whitchurch* v. *Whitchurch*, 2 P. Wms. 236; *Scott* v. *Fenhoulet*, 1 Bro. C. C. 69.) But should the intervening estate by any means determine, then the barrier of division between the two estates being removed, they will necessarily become united, and thus the lesser will become extinguished in the greater one: (*Holt* v. *Samback*, Cro. Car. 103; 3 Prest. Con. 142, 143.) An estate for the life of another, being the lesser estate, will merge in an estate for one's own life; but qualified fees, and conditional fees, being considered equal, do not merge in each other: (3 Prest. Conv. 170.) Nor will an estate tail, although the lesser estate, merge in an estate in fee simple, notwithstanding they are both united in the same person without any intermediate estate between them (*Wescot's case*, 2 T. R. 60); yet an estate tail after possibility of issue extinct, which is in fact no more than a mere life estate, may become merged in one of larger extent: (*Lewis Bowles' case*, 11 Rep. 80.)

An estate devolving upon a party by operation of law, will not cause a merger.

But an estate which devolves upon a party by act or operation of law; as, where a person tenant for life, or years, intermarries with the immediate reversioner in fee, which estate he then acquires in right of his wife, this will not cause a merger of his previous estate; because this acquisition devolves upon him by operation of law. Some further remarks will be made on the subject of merger when we come to treat upon estates for years, and of the assignment of terms to attend the inheritance.

## SECTION XIII.

### COVENANTS.

1. *Covenants for Title.*
2. *Distinction between general and qualified Covenants.*
3. *What Covenants are considered as synonymous.*
4. *Of Covenants for Quiet Enjoyment.*
5. *Covenants for further Assurance.*

### 1. *Covenants for Title.*

Omission of covenants for title will not invalidate a title.

It appears to be no objection to a title that the usual and regular covenants for title have been omitted in former conveyances (3 Prest. Abs. 58); but where any such covenants are inserted, it will be proper to see that they are expressed in apt terms, and also that they are entered into by the proper parties. This can rarely, if ever, be discovered by the abstract alone, from the usual mode in which covenants for title are abstracted, which is done by simply mentioning them as covenants from the vendor that he was seised in fee, &c. without stating with whom such covenant was entered into, which may sometimes be an important question, where it is desirable that the covenants should run with the land, which they clearly will not do when entered into by parties between whom there is no privity of estate (*Webb* v. *Russell*, 3 T. R. 393; *Stokes* v. *Russell*, ib. 678); as where such covenants are entered into with *cestui que use*, instead of the releasee to uses: (*Roach* v. *Wadham*, 6 East, 286.) But if made, as they ought to be, with

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the grantee or releasee to uses, they will enure incidentally to the *cestui que use*, and having thus once become annexed to the land, they will continue to run with it through all the subsequent modifications of ownership which the land may undergo ; and in this point of view it would seem to be quite immaterial whether the *cestui que use* (assuming him to be the donee of a power under the ordinary limitations in favour of a purchaser) alien the land by exercising the power, or by granting his estate ; for the mere shifting of the use (which is simply the effect produced by the appointment) cannot have the effect of severing the covenants from the land to which they have been once annexed, and with which they have actually begun to run in the hands of the first or immediate *cestui que use* : (see Jarm. Byth. 512.)

### 2. *Distinction between general and qualified Covenants.*

Practical observations upon covenants for title.

Covenants for title are either general, as extending to the acts of the whole world, or qualified, by being restricted to the acts of the covenantor and those under whom he claims by descent, will, or voluntary conveyance. In the case of a mortgage, the practice is for the mortgagor to enter into general covenants ; but a vendor, where the title is good, can only be required to enter into qualified covenants ; still, where there is any defect in a title, a vendor sometimes consents to enter into general covenants as a further protection to the purchaser. The importance of covenants of this kind must, however, depend in a great measure upon the means of the party entering into them ; and a learned writer observes (3 Prest. Abs. 57), purchasers attach more value to them than they are worth, which, considering the property of parties, and the chance of eventual insolvency,

rarely produce the benefit which is expected from them. He also further observes, that when the property is subdivided by sales, the purchasers lose the benefit of the former covenants, on the ground that the remedy cannot be apportioned, so as to subject the covenantor to several actions; consequently, where a man sells two farms to A. and covenants with him, his heirs and assigns, and one of these farms is afterwards sold by A. to B., B. can never sue on this covenant, since it would subject the covenantor to several actions: (3 Prest. Abs. 58.) And even when a covenant is general, unless it be against the acts of a particular person by name, it will only extend to an eviction by a party having a rightful title, and not to any eviction by wrong: (*Davie* v. *Sacheverell*, 1 Roll. Abr. Condition V. pl. 7; *Hayes* v. *Bickerstaffe*, Vaugh. 118; *Tisdale* v. *Essex*, Hob. 34; *Dudley* v. *Foliot*, 3 T. R. 584; *Foster* v. *Pierson*, 4 T. R. 617. But where a person undertakes to covenant against the acts of a particular person *by name*, in that case the covenant will extend to a wrongful as well as a rightful eviction by that person: (*Foster* v. *Mapes*, Cro. Eliz. 212; *Tisdale* v. *Essex*, Hob. 34; *Southgate* v. *Chaplin*, Com. 230; *Lloyd* v. *Tomkies*, 1 T. R. 671; *Hayes* v. *Bickerstaffe*, *sup.*; *Rashleigh* v. *Williams*, 2 Vent. 61; *Perry* v. *Edwards*, 1 Str. 400; *Nash* v. *Palmer*, 5 Mau. & Selw. 374; *Sowle* v. *Welsh*, 1 B. & C. 29.)

### 3. *What Covenants are considered as synonymous.*

Covenants for seisin and right to convey.

The covenants that the vendor is lawfully seised, and also that he has good right to convey, are considered as synonymous covenants, so much so, in fact, that the former is now more frequently omitted than inserted in modern conveyances. The latter covenant, indeed, extends not only to

the title of covenantor, but also to his right of disposition; and therefore if a vendor should covenant that he and another person had good right to convey, and it should turn out that the latter had no such right, it would be a breach of the covenant: (*Nash* v. *Ashton*, T. Jones, 195.)

Qualified covenants will restrain the general operation of a preceding implied warranty.

Where these covenants are qualified by being restricted to the acts of the covenantor, they will restrain the general operation of a preceding implied covenant or warranty; as where the word "grant" is used to pass a chattel interest, for it will not have that effect when inserted in a conveyance of freehold (Co. Litt. 384, *a.* n. (1); *Hayes* v. *Bickerstaffe*, Vaugh. 118, 126: *Clarke* v. *Sampson*, 1 Ves. sen. 101); but it seems that where the word "*give*" is used in a grant of freehold property, it will create an implied warranty; and such, indeed, as cannot be controlled by an express covenant: (Co. Litt. *a.* n. (1) 384; see also *Noke's case*, 4 Rep. 80, *b.*) The word "*give*" is, however, omitted in modern conveyances, so that any questions on that point are not likely to arise for the future, and as to deeds executed after the 1st October, 1845, no implied covenant can arise from either of the words "*give*" or "*grant*," except so far as either of those words may by force of any act of Parliament imply a covenant: (stat. 8 & 9 Vict. c. 106, s. 4.)

### 4. *Of Covenants for Quiet Enjoyment.*

Covenant for quiet enjoyment.

This covenant, though restrained by express words to the acts of the covenantor, and any persons claiming under him, or by his act, deeds, default, privity, or procurement, will extend to the acts of a person in whose name A. purchased conjointly with himself: (*Butler* v. *Swinnerton*, Palm. 339; Cro. Jac. 657.) It also extends to

an arrear of quit-rent due at the time of conveyance, although it was not stated to have accrued while the covenantor was tenant of the premises ; and Lord Ellenborough observed (3 East, 495), that if it were in arrear in his lifetime, it was a consequence of law that it was by his *default ;* that is, by his default in respect of the party with whom he covenants to leave the estate unincumbered. He will, therefore, be considered as having left it burdened with an incumbrance he ought to have discharged : (*Howes* v. *Brushfield*, 3 East, 491.) It also extends to a claim of dower set up by the covenantor's widow, but not to a claim of this kind made by his mother, because the widow claims under him, which his mother does not : (Godb. 333 ; Palm. 340.)

Whether a covenant for quiet enjoyment can be controlled by antecedent qualified covenants.

Questions have frequently arisen as to whether, when the covenant for quiet enjoyment is expressed in general terms, it can be controlled by the language of the antecedent covenant for title which provides against the acts of the covenantor only. It seems, however, that this construction will not be allowed. The covenant for title and right to convey are connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may, therefore, properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and of the indemnity it affords, it is immaterial in what respects, and by what

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means, or by whose acts, the eviction of the grantee or his heirs takes place ; if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. Nor does there appear to be any case in which it has been held that the covenant for quiet enjoyment is one with the covenant of title, or parcel of that covenant, or in necessary construction to be governed by it : (*Howell* v. *Richards*, 11 East, 633.) The two covenants are, in fact, perfectly distinct and separate ; the one goes to the title, the other to the possession : (*Norman* v. *Foster*, 1 Mod. 101.) Upon this principle, therefore, when the covenants for title are general, their extensive import cannot be brought within more restricted limits by a subsequent covenant for quiet enjoyment, which is confined merely to the acts of the covenantor, and parties rightfully claiming under him : (*Hesse* v. *Stevenson*, 3 Bos. & Pull. 565 ; *Smith* v. *Compton*, 3 B. & Ad. 189 ; overruling *Milner* v. *Horton*, M'Clel. 647.) A suit in equity, it must be observed, is within a covenant against disturbances generally : (*Calthorp* v. *Hayton*, 2 Mod. 54 ; *Hunt* v. *Danvers*, 7 Raym. 370.)

Covenants for freedom from incumbrances.

The general words of this covenant will include every kind of incumbrance with which the property can possibly become burdened, without any one of them being specifically mentioned. But where an estate is subject to a known incumbrance, then a purchaser, if he intends to rely upon the vendor's covenant as a protection against it, should take care to see that such incumbrance is specifically set out amongst the incumbrances the vendor is to covenant to

indemnify him from; otherwise it may be presumed that he took the estate subject to the incumbrance: (1 Prest. Abs. 283.)

### 5. *Covenants for further Assurance.*

Covenants for further assurance.

This covenant runs with the land, and the right of action for a breach of it, even in the ancestor's lifetime, will, unless damage was done to the ancestor, descend to the heir and not to the executor (*Kingdon* v. *Nottle*, 1 Mau. & Selw. 355), and any act of a vendor by which he disables himself from entering into further assurances, will amount to a breach of his covenant, although he should afterwards be restored to his former capacity: (5 Rep. 20.) Under this covenant a vendor is bound to a specific performance of all requisite acts, and executing all necessary assurances for perfecting the purchaser's title; but these, whether so stated or not in the covenant, must, as between vendor and purchaser, be at the expense of the parties requiring the same (1 Buls. 90); neither can a vendor under this covenant be bound to enter into any warranty (*Lassels* v. *Catterton*, 1 Mod. 67, n.), or, it seems, even covenants for title, or for further assurance: (see 1 Bart. Prec. 155, n. 173.) It seems to have been formerly considered that where the covenant was to enter into such assurances as the counsel of the purchaser should advise, it would be no breach if the vendor refused to execute such further assurance, unless prepared under the advice or assistance of such counsel: (*Bennett's case*, Cro. Eliz. 9; *More* v. *Roswell*, ib. 297.) This doctrine has, however, been since overruled, so that whether the assurance be prepared by counsel or not, provided it be not objectionable in other respects, the vendor is bound to execute: (*Clifton* v. *Gibbon*, Cro. Eliz. 264.) But it has been

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held that when a person has once executed such further assurance, he will be discharged from his covenant, although such assurance should eventually turn out to be insufficient for the purpose intended. And notwithstanding authorities have been sometimes adduced to prove a contrary position, yet they will, upon examination, it is apprehended, be found to relate to primary conveyances only: (1 Bart. Prec. 155, n. 78; Wat. Conv. by Merrifield, 558, 559.)

## SECTION XIV.

AS TO THE EXECUTION AND ATTESTATION OF DOCUMENTS.

1. *As to Deeds.* 2. *As to Powers.* 3. *As to Wills.*

### 1. *As to Deeds.*

Necessity of ascertaining that the several documents have been duly executed and attested.

In investigating a title, in addition to seeing that the various instruments contain sufficient terms to comprehend and convey the property, it will be requisite also to ascertain that they have been executed by all the necessary parties. The mere circumstance of the parties being named in the instrument will amount to nothing in a court of law, unless they have also executed it, whatever relief equity might possibly afford under such circumstances (1 Prest. Abs. 275); because, although a deed may be expressed to be made between several parties, yet in fact it will only be the deed of those who actually execute it, and will have no legal operation whatever against those who have omitted to do so. But if the deeds appear upon the inspection of them to be duly executed and attested, a purchaser has no right to call upon a vendor to prove the execution of the title deeds, and if the vendor brings an action against the purchaser for the non-completion of the contract, the latter has no right to call upon him to prove such execution. In purchases the practice is to deliver abstract on which a correspondence or communication by word of mouth takes place, and in most cases the question, if any arises, is on the law as it affects the title disclosed under such circumstances, a party having admitted the deeds to be authentic, and the legal effect of them as to the

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title being the only matter in dispute, is not to be allowed to turn round at the trial and require proof of the genuineness of the deeds themselves: (*Laythoarp* v. *Bryant*, 1 Bing. N. C. 421; *Thompson* v. *Miles*, 4 Esp. N. P. C. 184; *Crosby* v. *Percy*, 1 Camp. N. P. C. 303.)

### 2. *As to Powers.*

In the execution of powers the precise terms must be complied with.

Where difficult questions most frequently arise in cases of this description is in the execution of powers, the precise terms of which must always be complied with, otherwise nothing can pass under them: (*Hawkins* v. *Kemp*, 3 East, 410.) Hence, although signature is not absolutely necessary to the validity of an ordinary deed, which is perfected by the simple acts of sealing and delivery, yet where the power prescribes the appointment to be made by an instrument under *the hand and seal* of the donee of the power, and attested by one, two, or any given number of witnesses, the deed will not be considered as duly executed and attested unless the attestation express the fact that the instrument was *signed*, as well as sealed and delivered. And such attestation, it seems, in order that it may constitute a due and effectual execution of the power, ought to make part of the same transaction with the signing and sealing of the instrument, and cannot be added afterwards: (*Wright* v. *Wakefield*, 17 Ves. 454; *Doe* v. *Peach*, 2 Mau. & Selw. 576; *Wright* v. *Barton*, 3 ib. 512; *Moodie* v. *Reid*, 1 Mad. 516; *Hougham* v. *Sandys*, 2 Sim. 95.) But where the deed executing the power was required to be signed in the presence of witnesses, *but the witnesses were not required to attest the signature*, and the word "signed" was omitted in the attestation, the attestation was holden to be good (*M'Queen* v. *Farquar*, 11 Ves. 467); because that there was no direction that the signature should be attested.

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But if it be expressly stated that the signature shall be so attested, the attestation will then form an essential part of the appointment, and the power will be ill executed unless that fact be affirmed in the attestation clause : (*Wright* v. *Wakeford*, 17 Ves. 454 ; *Doe d. Mansfield* v. *Peach*, 2 Mau. & Selw. 576 ; *Wright* v. *Barlow*, 3 ib. 512; *Moodie* v. *Reid*, 1 Mad. 516 ; *Hougham* v. *Sandys*, 2 Sim. 95 ; see also 4 Ad. & Ell. 17.)

Observations upon Mr. Preston's act.

To obviate the difficulties in consequence of the omission of the word "signed" in the memorandum of attestation, Mr. Preston framed an act of Parliament, which received the royal assent on the 30th of July, 1814 (54 Geo. 3, c. 168), by which it is enacted, that every deed or other instrument then *already made*, with the intention to exercise any power, should, if duly signed and executed, and in other respects duly attested, be, from the date thereof, of the same validity as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto. (Sect. 1.)

Mr. Preston's act is only retrospective.

This act, however, is only retrospective ; consequently, cases arising subsequently to its coming into operation will be unaffected by it. And as the act only mentions a defective memorandum of attestation of signature, an omission of the fact of sealing is not cured by it. Hence, a power to appoint by deed or writing under the donee's hand and seal, and attested by two or more credible witnesses, was held to be ill executed by an instrument apparently under the donee's hand and seal, but which omitted to notice the sealing as well as the signing : (*Doe dem. Hotchkiss* v. *Pierce*, 6 Taunt. 402.)

Omissions in the execution of powers of will, how cured by recent Will

Omissions of this kind, as far as the execution of powers by will is concerned, are now, however, obviated by the late Will Act (1 Vict. c. 26), the 10th section of which directs that all powers by will must be by a will executed and attested

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in the manner prescribed by that statute; a subject that will be fully treated upon when we come to treat of the execution and attestation of wills, and which, in fact, must form our next matter of consideration.

### 3. *As to Wills.*

Of the execution and attestation of wills.

The only solemnity required by the Statute of Wills (32 Hen. 8, c. 1) was, that the will should be in writing; hence, a letter written by a man at sea, in which he mentioned his lands should go as therein directed, was held to be a good will: (*West's case*, Moore, 177.) Nor was it necessary that the writing should be by the testator, or be signed or sealed by him, even though the writing purported both, if it could have been shown that it was written by the testator's directions, and that he had declared it to be his will: (*Sir Francis Worseley's case*, 1 Sid. 315, pl. 33; 2 Keb. 128, pl. 82, by the name of *Stevens* v. *Gerrard;* see also *Browne* v. *Sackville*, Dy. 72; S. C. Anders. 34, pl. 85.) The 5th section of the Statute of Frauds (29 Car. 2, c. 3), however, enacts, that all wills of real estate must be in writing, and signed by the party so devising, or by some other person in his presence and by his express directions, and to be attested by three or four credible witnesses.

As to the signature of the testator.

Although the Statute of Frauds required the will to be signed by the testator, it did not require him to sign it in the presence of the witnesses, provided he acknowledged to them that it was his handwriting (*Dormer* v. *Thurland*, 2 P. Wms. 506; see also *Trymmer* v. *Jackson*, cited 1 Ves. 478; *Tollet's case*, Mos. 46; *Moodie* v. *Reed*, 1 Mad. 516; 7 Taunt. 355); neither was it material in what part of the will the testator's name appeared, if it could have been shown that he himself actually placed it there.

As, for example, in the case of *Lemayne* v. *Stanley* (3 Lev. 1), where a testator commenced his will thus:—"I, John Stanley, do hereby," &c. which was held to be a sufficient signing within the statute: (see also *Cook* v. *Parsons*, Pre. Cha. 192; *Smith* v. *Codron*, cited 2 Ves. sen. 455; *Stonehouse* v. *Evelyn*, 3 P. Wms. 252; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Addy* v. *Grix*, 8 Ves. 504; *Wesbeach* v. *Kennedy*, 1 Ves. & Bea. 362.) But now, by the statute 1 Vict. c. 26, s. 9, the testator's signature must be at the end, and must be made or acknowledged by him before the witnesses. (Sect. 9.) A signature or attestation by a mark, or a stamp, if it contains the name, is sufficient (*Harrison* v. *Harrison*, 8 Ves. 185; *Sanderson* v. *Jackson*, 2 Bos. & Pull. 239); but affixing or impressing a seal is not a sufficient signing within the statute; for the Statute of Frauds (29 Car. 2, c. 3, s. 5), requiring the will to be signed, undoubtedly meant some evidence to arise from the handwriting, whereas no particular evidence can arise out of a seal, added to which, when an act of Parliament mentions signing, it meant something different from sealing: (*Grayson* v. *Atkinson*, 2 Ves. sen. 454; see also *Smith* v. *Evans*, 1 Wils. 313; *Morrison* v. *Turnour*, 18 Ves. 175.)

Construction of the words "foot or end" under statute 1 Vict. c. 26, s. 9.

The statute 1 Vict. c. 26, s. 9, expressly requires that the signature should be at the "foot or end," upon which questions have arisen as to whether a signature on any other part of the will would be sufficient. In *Smee* v. *Bryer* (10 L. T. 380), where a will was signed by the testatrix writing her name on the fourth page of the sheet of paper on which the will was written, the signature being opposite to the attestation clauses, beneath which were the names of the witnesses, no part of the will being on the fourth page, was holden to be an insufficient signature at the "foot or end" within the meaning of the statute 1 Vict.

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c. 26, s. 9. The rigid construction put on the words "foot or end" in this case, rendered it advisable in *Re William Harris* (13 L. T. 10), to take the opinion of the court, as to whether a will signed by the testator after the attestation clause, was or was not a sufficient signature; and it was held to be signed at the foot or end. In *Re Hellings* also (13 L. T. 308), the will of a blind woman was held to be valid, although the will was contained in the first two pages of a sheet of paper, and the signature was half way down the third page, followed, however, by the attestation clause, and the names of the witnesses. *In the goods of James McCullum*, also, 3rd July, 1849, probate was granted of a will, although the signature was in the margin, and therefore not strictly at the "foot or end," as required by the statute. Again, in *Re M. Beadly*, *ib.*, a will was written on both sides of a sheet of paper, and on part of a third side. At the end of the will itself there was a blank space of about half a line, the words "one thousand eight hundred and forty-eight" forming the first line. Immediately below those words was an attestation clause, which extended from one side to the other wholly across the paper. About three inches below the last line of the attestation clause was the signature of the testatrix. Opposite to the signature was the word "witnesses." The name of the testatrix was followed immediately by the name of the two attesting witnesses. Thus, the signature of the testatrix was at the distance of three inches below the attestation clause, and consequently was not, strictly speaking, at the "foot or end" of the will. But Sir Herbert Jenner Fust held that the will was well executed.

*Operation of the statute with respect to blank*

The statute 1 Vict. c. 26, having made no provision whatever respecting cases where blank spaces have been left in the body of a will as originally

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prepared, and these having either been allowed to remain, or been wholly or partially filled up, a question of some nicety arises as to the admission of such a will at all, or at least of the filled up spaces, to probate, which must be governed by the circumstances of the case: (13 L. T. 454.) In *Comeby* v. *Gibbons* (13 L. T. 271), a will was prepared with blanks purposely left; some of these had been filled up, and one of these apparently in two different hands. Dr. Lushington, sitting for Sir H. J. Fust, held that as the statute was totally silent as to spaces left in the body of the will, it was not the duty of the court to introduce into the statute that which did not appear on the face of it, or to throw obstacles in the way of establishing the will; and he allowed probate to pass. And in *Birch* v. *Birch* (12 L. T. 334), a will had been prepared with blanks left purposely, according to the testator's instructions. The blanks had been filled up, but there was no evidence as to whether before or after execution; but they were filled up partly with black, and partly with red ink, and the will was found in a box, in the testator's possession at his death, enclosed in an envelope, which had been broken open and resealed. Under these circumstances, probate passed with those words which were written with black ink, but not those written in red ink.

spaces left in a will.

The Statute of Frauds (29 Car. 2, c. 3), although it required that three witnesses should attest the signing, did not require that all the witnesses should be present at the same time : (Gilb. Dev. N. 10, 12 ; *Cook* v. *Parsons*, Pre. Cha. 184 ; 2 Cha. Cas. 109.) In one case (*Jones* v. *Lake*, 2 Atk. 177, cited; see also 2 Ves. sen. 455 ; *Carleton dem. Griffin* v. *Griffin*, 1 Burr. 549), four years elapsed from the time the testator executed his will in the presence of two witnesses before it was attested by the third, and

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yet the will was held to have been properly attested. But all the witnesses must have attested the same instrument; for where two attested a will, and one a codicil made afterwards, it was considered insufficient: (*Lea* v. *Libb*, 1 Show. 68, 88; Carth. 292; 3 Mod. 262.) Neither would a codicil attested in pursuance of the Statute of Frauds have had the effect of republishing a will of lands where the will itself was not attested in pursuance of that statute: (*Attorney-General* v. *Barnes*, 2 Vern. 597; S. C. Pre. Cha. 370, by the name of *Attorney-General* v. *Bains*.) But now, under the act of 1 Vict. c. 26, all the witnesses must be present at the time of execution (sect. 9); hence, in a late case, where one witness signed at one time in the presence of the deceased, and the other at another time, it was held that the last-mentioned act required that the witnesses should be all present at the same time; and that as that requisite had not been complied with, the court had no alternative but to reject the motion for probate: (*Thompson* v. *Pigott*, Prerog. Court, March 18, 1845.)

The statute of Victoria does not require any particular form of attestation.

The act of 1 Vict. does not, however, require any particular form of attestation; still, if the fact of the witnesses being all present at the same time does not appear in the attestation clause, the Prerogative Court will require an affidavit that the will was so executed before they will grant probate. Where the signatures of the attesting witnesses were made by another person, they holding the top of the pen at the time their names were written, and no reason being given why they did not sign themselves, though able to do so, the signature was holden to be insufficient: (*In the goods of Thomas Kilcher*, 10 L. T. 482.) And where a witness to a will traced over his name previously written with a dry pen, Sir H. J. Fust held that this did not amount

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to a subscription as required by the act, June 28th, 1849. (*Ib.*) What the statute of 1 Vict. c. 26, requires in the execution and attestation of a will is, that such will be signed *at the end* by the testator, or some other person by his express direction, and the signature must be made and acknowledged by the testator (which was not formerly necessary) (*Dormer* v. *Thurland*, 2 P. Wms. 506; *Tollet's case*, Mos. 46; *Ellis* v. *Smith*, 1 Ves. 11; *Moodie* v. *Reid*, 1 Mad. 516; S. C. 7 Taunt. 355), in the presence of two or more witnesses present at the same time. But where a will was produced by the testator to two persons whom he asked to sign it, and there was some indirect evidence, not by the witnesses, that the will was signed by the testator at the time, probate was nevertheless admitted: (*Re Attridge*, 12 L. T. 351; see also *Burgoyne* v. *Showler*, 1 Roberts, 51.) Such witnesses must attest, and must subscribe the will in the presence of the testator; but, as before remarked, no form of attestation is necessary. As the law stood previously, under the Statute of Frauds (29 Car. 2, c. 3, s. 5), three witnesses were required to a will of real property, but none were necessary in the case of a bequest of personal estate (Gilb. Dev. 92; Swin. 558; Shep. Touch. 408); but now the same solemnities are required in the testamentary dispositions of both descriptions of property. (Sect. 9.)

*As to wills under powers.*

As the law stood previously to the late Will Act, a person creating a power might, as I have already had occasion to remark (*ante*, p. 418), have imposed such terms as he thought proper; consequently, he might have directed a power to be executed by a single note (*Day* v. *Thwaites*, 3 Cha. Cas. 69; *Wilkes* v. *Holmes*, 9 Mod. 485; *Moodie* v. *Read*, 1 Mad. 516), or writing, or by an unattested will (*Roscommon* (*Countess of*) v. *Fowke*, 6 Bro. P. C. 158); and, on the other hand, if he had re-

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quired any particular forms or ceremonies, such forms and ceremonies must have been complied with; hence, if a seal was required, an instrument under hand alone would not have sufficed: (*Dormer* v. *Thurland*, 2 P. Wms. 506; *Pulteney* v. *Darlington*, Gow, 260.) If the instrument was to have been signed, it could not have been executed otherwise; and if signature and sealing were required, an instrument would not have been valid, if only sealed. Still, where the power was to appoint by will generally, it must, to have passed lands, have been executed according to the Statute of Frauds. But now, under the statute of Victoria, no appointment made by will, in exercise of any power, will be valid, unless executed as another will; and no additional solemnities shall be required in the form of attestation: (sect. 10.)

What will be considered as an attestation in the testator's presence.

Both the Statute of Frauds and the statute of Victoria require the attestation to be made in the attestator's presence; but as neither says what shall be so considered, the law in this respect remains precisely as it was under the former statute (29 Car. 2, c. 3.) Cases of this kind must often depend in a great measure upon the particular circumstances attending them; yet, upon the whole, whenever the question has arisen, a very liberal construction has been allowed. Hence, where a testator desired the witnesses to go into another room, seven yards distant, in which there was a window broken, through which he might have seen them, it was held to be a signature in the testator's presence: (*Sheers* v. *Glasscock*, 2 Salk. 688; S. C. 1 Eq. Ca. Abr. 403, pl. 8.) And it was also held, that it was not necessary that the testator should actually see the witnesses subscribe their names, for that it was enough if he was in such a situation that he might have seen them if he would. In another case also, where a testatrix sat in her

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carriage opposite the windows of her attorney's office, in such a position that she might have seen the witnesses who there subscribed their names as attesting witnesses to her will, which they had before seen her execute, was a sufficient attestation in her presence: (*Casson* v. *Dade*, 1 Bro. C. C. 99.) But the testator must be in such a situation that he may see the witnesses subscribe, if he chooses so to do; therefore, where a testator duly subscribed his will in the presence of three witnesses, who went down stairs and attested his will there, which was out of the presence of the testator, the devise was held void for want of an attestation in conformity with the statute: (*Broderick* v. *Broderick*, 1 P. Wms. 239.) Again, in *Doe* v. *Manifold* (1 Mau. & Selw. 294), where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room, a person, by inclining himself forward with his head out of the door, might have seen the witnesses sign, but the testator himself was not in such a situation in the room that he might, by so inclining, have seen them, it was held that the will was not duly attested. And when the will is attested out of the testator's presence, it will be immaterial whether the witnesses retire at his request or not: (*Machell* v. *Temple*, 2 Show. 288.) The whole will must be present at the time of attestation; but this will generally be presumed, in the absence of positive proof to the contrary: (*Essex's* (*Earl of*) *case*, Comb. 174; *Bond* v. *Seawell*, 3 Burr. 1773.)

*As to competency of the witnesses.*

It was formerly questioned upon the construction of the Statute of Frauds (29 Car. 2, c. 3), whether the words "credible witnesses," used in that statute, did not mean something more than competent witnesses; but Lord Mansfield, in

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*Wyndham* v. *Chetwynd* (1 Burr. 414), determined that it did not, and this decision, it seems, settled the question. The new Will Act (1 Vict. c. 26) has however gone far beyond the doctrine established by Lord Mansfield, which seems only to have settled that any witness, who is a competent witness on a trial at law, is a sufficient witness to the attestation of a will; but by the 14th section of the act of Victoria, it is enacted, "that if any person who shall attest the execution of a will *shall at the time of the execution thereof*, or at any time afterwards, be incompetent to be a witness to prove the execution thereof, such will shall not on that account be invalid." So that now, so far from even a competent witness being necessary, no person whatever is incapable of being such, the act admitting of no kind of disqualification whatever.

Attesting witnesses incapable of taking any benefit under the will.

But an attesting witness under this act, as indeed he would have previously (25 Geo. 2, c. 6, s. 3), is totally disabled from deriving any benefit under the will; for by the 15th section it is enacted, "that if any person shall attest the execution of any will to whom, or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges for the payment of debts), shall be thereby given or made; such devise, legacy, estate, interest, gift, or appointment shall, so far as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will." A creditor may be a witness to a will, though the devised property is charged with the payment of debts (sect. 16); as may also the executor of the will (sect. 17.)

## SECTION XV.

### OF THE REVOCATION OF WILLS.

1. *Enactments of the Statute of Frauds respecting.*
2. *Operation of the statute* 1 *Vict. c.* 26.
3. *Effect of Tearing, Burning, or Destruction.*
4. *Alteration and Erasure.*
5. *Revocation made under a Misapprehension of Facts.*

### 1. *Enactments of the Statute of Frauds respecting.*

Alterations in the law effected by the Statute of Frauds.

BEFORE the Statute of Frauds a will might have been revoked by parol: (Dy. 310, pl. 81; Cro. Jac. 115; Str. 343, 418.) A distinction, however, appears to have been taken as to whether the intention to revoke was present or future; for instance, if a man had said, "I do revoke my will," it would have had that effect, which it would not have had if he had said, "I will revoke my will," thus referring to some future act to be done at some future time. By the 6th section of the Statute of Frauds (29 Car. 2, c. 3), it was however enacted that no devise in writing of any lands shall be revocable otherwise than by some other will, or codicil in writing, *or other writing*, declaring the same, by the testator himself, or in his presence, and by his express direction and consent; but all devises and bequests of lands

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and tenements shall remain and continue in force until the same shall be burnt, *cancelled*, torn, or obliterated by the testator, or by his directions, in manner aforesaid, or unless the same shall be altered by any other will or codicil in writing, *or other writing of the devisor signed in the presence of three or four witnesses declaring the same.* By this section of the statute (relating to revocations) it was not required that the witnesses should subscribe their names in the testator's presence, but the signing by the testator in the presence of the witnesses was expressly directed; whereas by the 5th section (relating to the making of wills), the witnesses must have subscribed in the testator's presence, though it was not necessary that he himself should have signed in the presence of the witnesses.

Distinction between a revoking instrument and an actual will.

An instrument therefore merely to effect a revocation would have been sufficient for that purpose, although it would have been incapable of passing real property, on account of the witnesses not having subscribed their names in the testator's presence; that is, supposing it to have been made for the mere purpose of revocation; for if it attempted anything further, as by assuming to dispose of property as a will, and was incapable of taking effect as such, it would never have been allowed to operate as an instrument of revocation: (*Eggleston* v. *Speke*, Carth. 79; 1 Show. 89; *Onions* v. *Tryer*, 1 P. Wms. 343, 346; 2 Vern. 741; 1 Eq. Ca. Abr. 408; Prec. Cha. 459; Gilb. Rep. 130; *Ex parte Ilchester* (*Earl of*), 7 Ves. 348; *Short dem. Gastrill* v. *Smith*, 4 East, 419.) And notwithstanding a signature in any part of a will is sufficient, if the will itself be properly attested (*Lemayne* v. *Stanley*, 3 Lev. 1), yet this would not have been a sufficient signature within the meaning of the 6th section of the statute to give authenticity to a mere revoking instrument: (*Hilton* v. *King*, 3 Lev. 68.)

But where a will was executed and attested in such a manner as to pass real estate, any disability in the devisee to take under it would not have prevented a revocation; as where lands were devised by the second will to a Papist, whilst Roman Catholic disabilities existed (*Roper* v. *Ratcliffe*, 10 Mod. 230; 5 Bro. P. C. 360; S. C. 2 Eq. Ca. Abr. 359, pl. 9, by the name of *Roper* v. *Constable*, Vin. Abr. tit. Dev. R. 3), or to persons incapable of holding under the Statutes of Mortmain (9 Geo. 2, c. 36), in both of which instances the former wills were held to have been revoked: (2 Roll. Abr. 614, pl. 7; 2 Eq. Ca. Abr. 359, pl. 9.)

A subsequent will revokes a prior will, although the devisee is incapable of taking under it.

And now an instrument, where the object is only to effect a revocation of an existing will, must be executed in the same manner as the will itself, otherwise it can have no operation; the 20th section of the new Will Act stating expressly "that no will or codicil, or any part thereof, shall be revoked, otherwise than as therein aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the same manner in which a will is thereinbefore required to be executed, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Revoking instrument must now be executed with the same formalities as an actual will.

2. *Operation of the Statute* 1 *Vict. c.* 26.

The act of Victoria does not seem to make any alteration in the law with respect to the revoking operation of a subsequent will upon one made previously; in this respect, therefore, the law remains precisely as it was before. In order, however, that a subsequent will may revoke a prior one, there must either be an inconsistency

That a subsequent will may revoke a prior one, there must be an inconsistency in the dispositions.

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in the dispositions contained in the two instruments, or the latter must in express terms revoke the former one. It has, indeed, been said, that merely making a subsequent will furnishes a fact from which it may necessarily be inferred that the former will was not intended to stand. This, probably, arose from the civil law construction, that no man can die with two wills; for by the Roman law a subsequent will operated in all cases as a revocation of a former; the reason of which was that the essence of a Roman testament consisted in the institution of an heir who took the whole property of the testator, so that two wills could never subsist at the same time. But although the law of England has adopted the principle of the Roman law respecting wills of personal estate, yet a devise of lands is looked upon in a very different light, being considered as an appointment of lands to a particular person; from whence it follows that a man may as well dispose of part of his lands by will, as the whole. In consequence of this principle, it appears that where a second will has not a clause of revocation of all former wills, or does not make any disposition inconsistent with a former will, it does not operate as a revocation of such former will, but both are good: (*Hitchins* v. *Bassett*, 2 Salk. 591; *Goodright* v. *Harwood*, 3 Wils. 497.) Yet if the latter will contains a clause expressly revoking all former wills, and such latter will is legally executed, it will revoke a former one, whether there is any inconsistency in the dispositions or not: (*Burtenshaw* v. *Gilbert*, Cow. 49, 55.)

A simple declaration of an intention to make a future disposition will not cause a revocation.

A testator merely declaring in his second will that he intends to make a future disposition of his property, will not operate as a revocation of his former will, for in order to have that effect, a disposition must be actually made, or the former will must be revoked in express terms. Hence in *Thomas* v. *Evans* (2 East, 488), where a

testator made his will, whereby he bequeathed all his personal estate to his mother, and after several intermediate limitations devised the ultimate remainder to T. Upon the testator afterwards acquiring other estates, some by purchase and some by devise, and the estate to his mother having lapsed by her death in his lifetime, the testator made a second will disposing by name of the property which had been so devised to him, and then added, "*as to the rest of my real and personal estate, I intend to dispose by a codicil hereafter to be made to this my will;*" and this was determined to be no revocation of the former will; that it was not necessary to suppose the words intimating a future intention to be meant to embrace the real property before devised, as the testator had acquired estates since the first will, which were not included in the second, and might satisfy the words by which the future intention was expressed. But admitting these words to include real property devised by the will, still it did not appear that the disposition to be made of it would be inconsistent with the former devise, and even supposing it to be intended to be inconsistent, yet an express intention to revoke would not operate as an actual revocation. For it was truly observed at the bar and on the bench, that what would not have been a revocation before the statute, would not be so since, though reduced into writing with all the formalities of the statute; and it had been decided that a bare intention to revoke, though expressed by parol, was no revocation before the statute, unless the testator had declared that he did revoke his will: (see *ante*, p. 429.)

### 3. *Effect of Tearing, Burning, or Destruction.*

Revocation by burning, tearing, or

The act of Victoria only mentions *burning, tearing, or otherwise destroying the same*, by the

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otherwise destroying.

testator or by some person in his presence, and by his direction, *with the intention of revoking the same.* The word "*cancelling*," which is inserted in the revoking clause of the Statute of Frauds, is, however, omitted in this act; upon which a question arises, as to whether the simple act of cancellation would now have that effect. This must depend in some measure on the mode by which such cancellation was done. If a testator were to cancel his will by tearing off his name, then it seems it would be a tearing of the will by the testator with the intention of revoking the same within the express words of the last-mentioned statute; and it should also seem, that if a testator were to obliterate his name, it ought to be construed as a destruction of the will with the intent of revoking the same, the very act of obliteration affording positive evidence of that intent, and the will not having the testator's name attached to it, being thus deprived of one of its essential properties. Nor was it ever considered necessary, in order that a will should be revoked by tearing, burning, cancelling, obliteration, or the like, that either of those acts should have been fully completed, if it could have been shown that such was the testator's undoubted intention. Thus in *Bibb* v. *Thomas* (2 Black. Rep. 1043), W. P. having made his will, declared himself discontented with it, and one day, being in bed near the fire, he ordered one Mary Wilson, a woman who attended him, to fetch his will. He opened it, looked at it, gave it something of a rip with his hands and so tore it as almost to tear a bit off, and then rumpled it together and threw it on the fire, but it fell off. It must, however, have been soon burned had not Mary Wilson taken it up and put it into her pocket. W. P. did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was doing; to which she

made little or no answer. He at several times after said that it was not, and should not be his will, and bade her destroy it. She said, at first, "So I will when you have made another;" but afterwards, upon his repeated inquiries, she said she had destroyed it, though in fact it never was destroyed. She asked him when his will was burned to whom his estate would go. He answered to his sister and her children. He afterwards wrote to his brother, John Mills, telling him he had destroyed his will, and would make no other till he had seen him, and desired him to come, for, said he, "if I die intestate it will cause uneasiness." W. P. died without making any other will. The jury thought this a sufficient revocation, and gave a verdict for the heir-at-law; and, on a motion for a new trial, the court were of opinion that this was a sufficient revocation, and said, that a revocation under the statute may be effected either by framing a new will amounting to a revocation of the former, or by some act done to the instrument itself, as by burning, tearing, cancelling, or obliterating by the testator, or in his presence and by his direction; and that any of these acts, with a declared intent, was a sufficient revocation.

Destruction by accident or mistake no revocation.

But if a testator were to destroy his will by accident or mistake, this would be no revocation; as, if, inadvertently, a man were to throw ink on his will, instead of sand (Cow. 92), or having two wills of different dates by him, should destroy the latter, where his undoubted intention was to destroy the former, neither of these acts would be construed as a revocation. So also where a testator, believing he had made a subsequent valid will, began to tear up his former one, but desisted, upon being told that his latter will was incapable of passing real estate, because it was not attested in pursuance of the Statute of Frauds (29 Car. 2, c. 3, s. 5), it was held

that this partial destruction did not revoke the former will (*Hyde* v. *Hyde*, 1 Eq. Ca. Abr. 108, pl. 3; see also *Onions* v. *Tryer*, 1 P. Wms. 343; 2 Vern. 742; Pre. Cha. 459); and in *Windsor* v. *Pratt* (2 Bro. & Bing. 650), Dallas, C. J., said, that the cancelling a will depends on the validity of the second will, and ought to be taken as one act done at the same time, so that if the second will is not valid, the cancelling the first, being dependent thereon, ought to be looked upon as null and inoperative. This rule, however, can only obtain where the first will is cancelled for the purpose of making way for another disposition, and not where it is done on grounds of absolute dissatisfaction with the will already made: (*Burtenshaw* v. *Gilbert*, Cow. 49.)

### 4. *Alteration and Erasure.*

Obliteration, interlineation or erasure, how far a revocation.

Under the Statute of Frauds, a partial obliteration or erasure would not have revoked a will beyond the particular object of such obliteration; as where a testator, after devising his lands to trustees upon certain trusts, struck out the name of one of them, and after such erasure never republished his will, this was holden to be no revocation, further than as revoking the devise to one of the trustees, whose interest was thereby revoked, and the devised estate thus became vested in the remaining trustees: (*Larkins* v. *Larkins*, 3 Bos. & Pull. 16.) So where a testator devised his lands upon trust to sell and apply a moiety as therein directed, and afterwards altered, obliterated, and interlined some portion of it, this was held to be no revocation of the unobliterated and unaltered parts of the will: (*Sutton* v. *Sutton*, Cow. 812; see also *Short dem. Gastrell* v. *Smith*, 4 East, 419.) And it has also been held, that where a testator by his will annexes one estate to another, de-

claring that the same shall go unto and be enjoyed by the possessor of the other estate, and not be separated, and by any act in his lifetime revokes the devise of the principal estate, the property so annexed is not thereby affected, but goes according to the uses declared of the principal estate by the will: (*Darley* v. *Langworthy*, 3 Bro. P. C. 359, reversing Lord Camden's decree in *Darley* v. *Darley*, Ambl. 653.) And by the 21st section of the new Will Act, "no obliteration interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alterations shall be executed in like manner as before required for the execution of the will; but the will, with such alterations as part thereof, shall be deemed to be duly executed, if the signature of the testator, and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end, or some other part of the will."

### 5. *Revocation made under a Misapprehension of Facts.*

As to the admissibility of parol evidence to show what the original words were.

The case of *Brooke* v. *Kent* (3 Moo. P. C. C. 341), established the principle that parol evidence was to be received to show what the original words were that had been erased with an intention to substitute other words after the execution of the will. This case was followed in the late case of *In the goods of W. Reeve* (13 L. T. 103), where words had been erased from a will after its execution, and others substituted with a view to revocation of a bequest, and there was no re-execution of the will nor any memorandum at

the foot thereof referring to them. The words thereupon as altered could not take effect; and it was held that parol evidence should be taken to show what the original words were, so that probate of the will might go with them so supplied; and in ascertaining what the original words were, the aid of a person skilled in deciphering handwriting will be had recourse to; but where such a person had examined erasures in a will, and had also deposed that in another part of the will an addition was made at a different time from the rest of the document, but had not been asked as to this, the court refused to be influenced by his opinion as to the latter, and allowed the alleged addition to remain: (*In the goods of Hon. Anne Rushout*, 13 L. T. 264.)

A revocation made under a misapprehension of facts, no revocation, when.

If a person, under a misapprehension of facts, revokes his will, and it appears that such misapprehension was the *sole impelling motive*, it will not amount to a revocation; as in the case of *Campbell* v. *French* (3 Ves. 321), where a testator by his will gave a legacy to A. and B., describing them as the grandchildren of C., and their residence to be in America, and by a codicil he revoked these legacies, *giving as a reason that the legatees were dead*, but the supposition as to that fact proving erroneous, the legatees were held to be entitled, on proof of identity.

The mistaken supposition must be the sole impelling motive.

But it ought to appear beyond all doubt that the mistaken supposition as to the facts was the sole motive for the revocation; for if a person merely gives as a reason that he is advised that his devise is not valid at law, and under such impression he makes another disposition of his property, as such devise does not depend upon the point of law, but is grounded on the advice only, without any reference to the reality of the law, it will effect a revocation let the point of law turn which way it will. As for example, in *Attorney-General* v. *Lloyd* (3 Atk. 550), where

S. W., by his will, dated 8th of Feb. 1734, gave particular lands and his personal estate to be laid out in lands to charitable uses, and by a codicil, dated the 12th of July, 1736, declared that if by the Mortmain Acts those estates should not go to those uses, he gave them to B. and his heirs; by a second codicil of the 17th of March, 1736-7, reciting *that he had been advised* that the devise of his land was void, gave his personalty to the same charitable uses, and his real estate to M. B. The Mortmain Act passed in 1737. The advice upon which the testator professed to proceed appeared not to have been well founded, for it had been decided in *Ashburnham* v. *Bradshaw* (2 Atkyns, 36), by the certified opinion of all the judges (except Denton, who was in ill health), that a devise of lands to charitable uses made before the Statute of Mortmain (9 Geo. 2, c. 36), *notwithstanding the testator survived the statute, passed the lands.* Lord Hardwicke was, however, of opinion that the codicil of the 17th of March, 1736, was a revocation of the former bequests; and the principal reason which weighed with him was, that he doubted whether the new disposition by the codicil was singly upon the point of law, the words of which were: "It being my intention that the charity should be continued, and being advised my personal estate can be given, I do hereby by this codicil give my personal estate to the charitable uses, and my real estate to M. B." Nor will the mistaken notion that the parties taking under the will are dead, being recited in a subsequent will, revoking bequests to them, prevent such revocation, unless it appears that such mistaken notion was the sole motive for making the alteration. Hence, where a testatrix bequeathed a legacy of 300*l.* amongst such of the children as should be living of E., and by a codicil declared as follows: "I give to my bro-

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ther's son C. the 300*l.* designed for E.'s children, *as I know not whether any of them are alive, and if they are well provided for,*" Lord Alvanley (then Sir R. P. Arden, M. R.) held C. to be entitled, though the children of P. were living. His Honour, however, said, "That if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case so often cited from Cicero de Oratore, of *pater credens filium suum esse mortuum alterum instituit hæredem: filio domo redeunte hujus institutionis vis est nulla;* but she goes further—that she doubted, if they were living, whether they might not be well provided for; and she totally deprives them of that provision. The court will not inquire whether they are well provided for or not:" (*Attorney-General* v. *Ward*, 3 Ves. 327.)

*Browning* v. *Budd.*

The decision in *Browning* v. *Budd* (13 L. T. 1), on an appeal from the Prerogative Court of Canterbury, is one of considerable importance, as the judgment of the Prerogative Court was founded upon the assumed fact that a testatrix, a married woman, not being aware of the operation of a second will which she was induced to execute in favour of her own relations, in opposition to the beneficial interest which her husband would otherwise have taken under the provisions of a marriage settlement, and in direct opposition to a will which she had previously made in his favour, rendered such second will invalid; and the Prerogative Court accordingly rejected the second will. The case did not turn upon fraud from duresse, for it was not proved that any undue influence or importunity was used, that is, anything in the nature of force or fear, destroying free agency, which is necessary, according to Sir John Nicol's definition of those terms in *Williams* v. *Goode* (1 Hagg. 581.) In *Browning* v. *Budd*, the Privy Council, reversing

the judgment of the Prerogative Court, held that it is not sufficient that a testator may be led into a mistake as to the legal effect of a prior instrument with reference to the interest which the intended object of his bounty took under such instrument, to invalidate a will properly executed, the testator being, at the time of executing such last will, possessed of a competent disposing mind; and therefore such a will should be declared to be the last will of the testator, and as such admitted to proof.

## SECTION XVI.

### OF THE REPUBLICATION OF WILLS.

1. *Old Laws relating to.*
2. *Recent Enactments respecting.*
3. *Effect of Republication.*

### 1. *Old Laws relating to.*

How a revoked will may be revived—Republication.

BEFORE the Statute of Frauds, a will, even of real estate, might have been republished by parol, so as to pass subsequently acquired lands: (*Montague* v. *Jefferies*, 1 Roll. Abr. 618, pl. 6, 7; *Trevillion's case*, Dy. 143, *a*, *b*; *Cheesman* v. *Turner*, Sty. 343; *Beckford* v. *Parnecott*, Cro. Eliz. 493; Moor. 404; Goulds. 150; *Fuller* v. *Fuller*, Cro. Eliz. 423; *Cotton* v. *Cotton*, Freem. 138; 2 Vern. 209.) But after the Statute of Frauds there could be no parol republication of a will of lands (*Acherley* v. *Vernon*, 2 Eq. Ca. Abr. 769, pl. 1; 2 Com. 381; 9 Mod. 78; *Hawe* v. *Burton*, Comb. 84; *Martin* v. *Savage*, 1 Ves. 440, cited); a rule which was at one time so strictly adhered to, that it was considered there could not be an implied republication of a will of lands, even by the execution of a codicil expressly referring to the will, but that the will itself must have been re-executed: (*Lytton* v. *Faulkland* (*Lady*), Vin. Abr. tit. Dev. 2; *Penphrase* v. *Lansdown* (*Lord*), *ib.*) But this doctrine has been long since overruled, and it was

settled that the re-execution of the will was not necessary, for that a writing, according to the provisions of the Statute of Frauds, expressing that intent, was sufficient: (*Acherley* v. *Vernon, sup.*; *Potter* v. *Potter*, 1 Ves. sen. 437; *Gibson* v. *Montford, ib.* 485, 487; *Carte* v. *Carte*, 3 Atk. 180; *Attorney-General* v. *Downing*, Ambl. 571; *Jackson* v. *Hurlock*, 2 Ed. 263; *Barnes* v. *Crowe*, 1 Ves. 486; *Piggott* v. *Waller*, 7 *ib.* 98; *Goodtitle* v. *Meredith*, 2 Mau. & Selw. 5; *Hulme* v. *Heygate*, 1 Mer. 285.)

### 2. *Recent Enactments respecting.*

Operation of stat. 1 Vict. c. 26.

By the 22nd section of the late Will Act (1 Vict. c. 26), no will, or codicil, or any part thereof, which shall be in any manner revoked, shall be revived, otherwise than by the re-execution thereof, or by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Destruction of subsequent will will not revive prior will if done subsequently to the year 1838; *aliter* if done previously.

This section of the act, as far as relates to wills coming within its operation, viz., wills made after 1838, will prevent the destruction of a subsequent will from reviving a prior will which it had revoked; but this does not apply to wills made previously; consequently, where, prior to the year 1838, a testator made two wills, the latter of which was inconsistent with the former, and he afterwards destroyed the second, leaving the first in a perfect state, the original will was thereby set up again, and regained its original force and operation: (*Goodright* v. *Glazier*, 4 Bur. 2512; *Harwood* v. *Goodright*, Cow. 87, 92.)

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As to wills of personal estate.

In the case of wills of personal estate, however, which are not within the Statute of Frauds, stronger circumstances than the simple act of cancelling a later will were held necessary in order to revive a prior one; and it seems for a considerable time to have been an established rule in the Ecclesiastical Court, that the execution of the second will was a revocation of the first, though the first was afterwards destroyed: (*Whitehead* v. *Jennings*, before the Delegates, 1714; *Burt* v. *Burt*, Prerog. Court, 1718; *Helyer* v. *Helyer*, *ib.* 1758; *Moore* v. *Moore*, 1 Phill. 412.) In order that such first will might have been revived, there must have been some act of republication, or some revival by necessary implication, or something to have plainly indicated such an intention. This, it seems, might have been proved either by declarations of the testator, or other parol evidence (which is admissible in the Ecclesiastical Courts), or by the nature and contents of the instruments themselves: (*Ustick* v. *Bawden*, 2 Add. 116; *Kirkcudbright* (*Lady*) v. *Kirkcudbright* (*Lord*), 1 Hag. 326.) The statute of Victoria has now abolished all distinctions as to the republication of wills of real and personal estate, as the same formalities are required to republish a will of either kind of property.

### 3. *Effect of Republication.*

Effect produced by republication.

The effect of republishing a will is to make it in all respects as a new will actually made at the time of such republication. The question of republication was a far more important question prior to the late Will Act than it is likely to become again; because now the will speaks from the death of the testator, and will comprehend all property its terms are sufficient to embrace, as well as include all persons sufficiently described

therein, although such lands were not purchased, or such persons born, at the time the will was made (sect. 24); and a simple republication of the will could never have effected more than this (*Heylyn* v. *Heylyn*, Cow. 130; *Perkins* v. *Mickle-thwaite*, 1 P. Wms. 274; *Steed* v. *Berrier*, Ventr. 340; S. C. by the name of *Strode* v. *Perryer*, 2 Mod. 313; 2 Lev. 243; 2 Show. 63), and, even then could only have spoken from the time of republication.

Effect of republication upon lapsed devises.

A republication, though it had the effect of bringing the will forward so as to make it speak from that time, yet would not have converted words of limitation, applied to a devisee who died in the testator's lifetime, into words of purchase, so as to let in the heirs or children in the place of their deceased ancestor or parent, although the testator was aware of the death of the ancestor, and of the birth of his children: (*Sympson* v. *Hornsby*, Pre. Ch. 439; *Brett* v. *Rigden*, Cro. Eliz. 422, as to real estate; and *Elliott* v. *Daven-port*, 1 P. Wms. 83; *Maybanks* v. *Brooks*, 1 Bro. C. C. 84; *Corbyn* v. *French*, 4 Ves. 418, 435; *Tidwell* v. *Ariel*, 3 Mad. 406, as to personalty.) Nor has the statute of Victoria made any alteration in the law as affects devises of estates in fee-simple, or absolute interests in personal property; but in the instance of estates tail, or *quasi* estates tail, it enacts that those estates shall not lapse by the death of the tenant in tail in the testator's life-time, provided he leave issue unheritable under the entail at the time of the death of the testator: (sect. 32.) And gifts by the testator to his own children, or other issue, of any real or personal estate, will not lapse by the death of such children, or issue, in the testator's lifetime, if such children, or other issue, leave any issue living at the testator's death, unless a contrary intent appears by the will: (sect. 34.) But except as to wills within the operation of this statute, the devise

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or bequest, be it of real or be it of personal estate, must fail of effect by the death of the devisee or legatee in the testator's lifetime, though limited to a man and his representatives by the will; unless the estate is limited to the latter in such terms as to make them take as purchasers, in which case they would be entitled to claim in their own right as *designatio personæ*, and not in course of descent through their ancestor.

Whether a gift is or is not an independent gift to children.

In *Smith* v. *Oliver* (13 L. T. 454), a question was raised as to whether a gift was, or was not, an independent gift to the children of a legatee. There a testator gave legacies to several persons, and directed them to be paid within six months after his decease, and if any of his said legatees should die, not having received their respective legacies, and leave any children, they should take their parent's share in equal proportions. One of the legatees died in the lifetime of the testator, leaving children:—Held, that the share lapsed, and the children took nothing.

## SECTION XVII.

### DESCENTS.

1. *Old Law with respect to Descents.*
2. *Recent Enactments respecting.*

### 1. *Old Law with respect to Descents.*

Alterations effected by recent enactments.

Some very important alterations have been effected in the law of descents by the statute of the 3 & 4 Will. 4, c. 106. In attempting, however, to point out what those alterations are, it will be necessary to refer continually to the old law, in order to ascertain the extent of the changes effected by the new, and to enable us to show what really is the present existing law upon the subject. According to Blackstone (vol. ii. p. 201), descent, or hereditary succession, is a title whereby a man on the death of his ancestor acquires his estate by right of representation as his heir-at-law; and as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be necessary previously to state as briefly as possible the true notion of kindred, or alliance in blood. "Consanguinity," continues the learned commentator, "or kindred, is defined by the writers on these subjects to be the connexion or relation of persons descended from the same stock, or common ancestor. This consanguinity is either lineal or collateral. Lineal

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consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between John Stiles, the *propositus*, and his father, grandfather, and great-grandfather, and so upwards; or between John Stiles and his son, grandson, and great-grandson, and so downwards, in a direct descending line. Every generation in this lineal consanguinity constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second degree; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and, therefore, universally obtains, as well in the civil (Ff. 38, 10, 10), and canon (Decretal, 1, 4, tit. 14), as in the common law (Co. Litt. 23). Collateral kindred answers the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock, or ancestor, but differing in this, they do not descend the one from the other. Collateral kinsmen, are such as lineally spring from one and the same ancestor, who is the root, or common stock, from whence all these relations are branched out. As, if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles, as their common ancestor, and they are collateral kinsmen to each other; because they are descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*." (2 Blac. Com. 204, 205.)

How the lineal inheritance formerly descended.

By law no inheritance can vest in any person until the death of the ancestor, the rule of *nemo est hæres viventis* being as fixed a rule of law, as that a limitation to a man and his heirs will create in him an estate in fee-simple. During

the ancestor's lifetime, therefore, the person who is next in the line of succession is called the heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son, or his issue, who must, by the course of the common law, be heir to the father, whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose presumptive hopes may be hereafter cut off, by the birth of a son. So that even if the estate had descended by the death of the owner to such brother, or nephew, or daughter, in the former cases, the estate will be divested by the birth of a posthumous child; in the latter, it will be wholly divested by the birth of a posthumous son, or divested, as to one moiety, by the birth of a posthumous daughter, as the estate will then devolve upon both daughters in coparcenary: (Bro. tit. Desc. 58; 2 Blac. Com. 208.)

Course and order of descent.

It was an express rule of the feudal law (2 Feud. 50) that the lands shall descend downwards, and never ascend upwards; consequently, if a person had purchased lands, and died without descendants, or in fact with no relation on earth but his father, the latter could in nowise have inherited those lands: (Feud. 20; 2 Blac. Com. 112.) But now, under the 6th section of the statute 3 & 4 Will. 4, c. 106, every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be the heir, in preference to any person who would have been entitled to inherit, either

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by tracing his descent through such lineal ancestor, or in consequence of their being descendants of such lineal ancestor, so that the father shall be preferred to a brother, or sister, and a more remote lineal ancestor to any of his issue, other than a lineal ancestor or his issue: (sect. 6.)

Males preferred to females.

Two other rules in the canon of descent (2nd and 3rd canons), were, first, that the male issue shall be admitted before the female; secondly, that where there are two or more males in equal degree, the eldest only shall inherit; but in the case of females the whole of such females shall inherit together. Thus sons shall be admitted before daughters; if, therefore, John Stiles had two sons and two daughters, and died, his eldest son would first have taken, and in case of his death without issue, then the other son would have been admitted to the succession in preference to both the daughters (2 Blac. Com. 213; Hale H. C. L. 235); the latter of whom, on the death of both their brothers without issue, would both have inherited as coparceners (Litt. s. 5, Hale H. C. L. 238); and in this respect the law still remains unaltered.

Of the fourth rule or canon of descents.

The fourth rule or canon of descents, is, that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living. Thus the child, grandchild, or great-grandchild, either male or female, succeeds before the younger son *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done. And by the fifth canon, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to the blood of the first purchaser; subject to the three preceding rules. Thus if Geoffrey Stiles purchase land, and it descends to John Stiles, his son, and John dies seised

thereof without issue, whoever succeeded to this inheritance must have been of the blood of Geoffrey, the first purchaser of this family: (Co. Litt. 12; 2 Blac. Com. 220.)

Fourth rule or canon of descents derives its origin from the feudal system.

This rule derived its origin from the feudal system, for when feuds began to be hereditary, it was made a necessary qualification of the heir that he should be of the blood, that is, lineally descended from the first feudatory or purchaser; in consequence whereof, if a vassal died possessed of a feud of his own acquiring, or *feudum novum*, it could not have descended to any but his own offspring; no, not even to his brother, because he was not descended nor derived his blood from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might have succeeded to such inheritance: (1 Feud. 1, s. 2.) In process of time, therefore, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance by granting him a *feudum novum*, to hold *ut feudum antiquum*, that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been descended from the first imaginary purchaser, since it was not ascertained in such general grants whether the feud should be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, that is to say, as a feud of indefinite antiquity; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors by whom the lands might possibly have been purchased, were capable of being called to the inheritance. Yet when an estate had really descended in a course of inheritance to the person last seised, the strict

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rule of the feudal law was still observed; and none were admitted but the heirs of those through whom the inheritance had passed. As for example, if lands had come to John Stiles by descent from his mother, no relation of his father, as such, could ever have succeeded as heir to those lands; and *vice versâ*, if they had descended from his father, no relation of his mother, as such, could ever have been heir to those lands. And so if the estate descended from his father's father, the relations of his father's mother, for the same reason, must have been rejected. Here, then, we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors from whom the feud was conveyed to the late proprietor. But when, through length of time, it could be traced no further, as if it was not known whether his grandfather inherited paternally or maternally, or if it appeared that the grandfather was the first grantee and so took it by the general law as a feud of indefinite antiquity, in either of these cases the law admitted the descendants of any ancestor of the person last seised, either paternal or maternal, to be in their due order his heirs; because, in the first case, it was really uncertain, and, in the second case, it was supposed to be uncertain, whether the grandfather derived his title from the part of his father, or of his mother. This, then, as Blackstone remarks (2 Blac. Com. 223), was the great and general principle upon which the law of collateral inheritances depended; that, upon failure of issue of the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it really had, or was supposed by fiction of law, to have, originally descended: (Year Book, 12 Ed. 4, 14; Fitz. Abr. tit. Descent, 2; Hale, H. C. L. 243.)

### 2. *Recent Enactments respecting.*

Alterations in the law of descents effected by recent enactments.

Thus stood the law formerly; but now, by statute 3 & 4 Will. 4, c. 106, s. 2, it is enacted (sect. 1), "that in every case the descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." Upon the construction of this section of the act, it has been held that when land descends to the son of an illegitimate father, who is proved to have been the purchaser thereof, and the son died seised and intestate, and without issue, such land does not devolve upon the heir *ex parte maternâ*, but escheats to the crown (Selw. N. P. 750; *Doe dem. Blackburn* v. *Blackburn*, 1 Moo. & Rob. 547); which, it seems, it would not have done previously by the rules of common law: (Litt. s. 4; Hale M. S. cited 2 Harg. Co. Lit. 12 a., n. 6; 1 Moo. & Rob. 549, n.) That such a result was not the intention of the framers of the act, appears from the report of the Real Property Commissioners upon this very subject, who say, "We further think that the last proprietor may be treated as if he had been the purchaser, in the rare case in which the line, from which the estate descended to the last proprietor, has failed, for the purpose of admitting to the inheritance his other relations, *rather than let it escheat.* It may," they add, "seem superfluous to legislate for

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cases like these, which may appear very unlikely to occur in practice; they are, however, found to occur *in consequence of the acquisition of estates by persons of illegitimate birth*," &c. That the above-mentioned statute, so far from accomplishing this object, produced a result directly the contrary, appears from the case just referred to; and that the lands would not under those circumstances have escheated at common law, appears from Litt. s. 4, and the case cited from Hale, by Mr. Hargrave, Co. Litt. 12 a., n. 6. Messrs. Moody and Robinson, in a note to their report of *Doe* v. *Blackburn* (p. 599), also observe, "that in order to effect the object of the commissioners, there should perhaps have been a provision that in cases where the line of the first purchaser was extinct, the descent might be traced from the person last seised."

As to collateral heirs.

By the sixth rule or canon, the collateral heir of the person last seised must have been his next collateral kinsman of the whole blood. Hence, if a father had two sons by different wives, they not being brethren of the same blood could not have inherited to each other, but the estate should rather have escheated to the lord. Now, even if the father being seised of real estate died, and his lands descended on his eldest son, who entered thereon and died seised without issue, the younger son could not have inherited this estate, because he was only the half-blood of the person who was last seised. The absurdity and gross injustice of this doctrine is so obvious, notwithstanding the original feudal principles upon which it may have been founded and the legal subtleties and refinements by which it was supported, that our only wonder is that it could so long have been allowed to remain the law of the land. The statute now under discussion has at last, however, done away with it, by first enacting that no brother or sister shall be considered to inherit from his or her

brother or sister, but every descent from a brother or sister shall be traced through the parent: (sect. 5.) And afterwards further enacting (sect. 91) "that any person related to the person from whom the descent is to be traced by the half-blood, shall be capable of being his heir; and the place in which such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father, and their issue, and the brother of the half-blood on the part of the mother shall inherit next after the sisters of the whole blood on the part of the mother:" (sect. 9.)

Doctrine of the seventh rule or canon confirmed.

The seventh or last rule or canon was, that in collateral inheritances the male stock shall be preferred to the female (that is, kindred from the blood of the male ancestors shall be admitted before those from the blood of the female), unless where the lands have in fact descended from a female. Thus the relations on the father's side were admitted *ad infinitum*, before those on the mother's side were admitted at all (Litt. s. 4); and the relations of the father's father, before those of the father's mother. This doctrine has been confirmed by the late statute, which enacts "that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting, until all of his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor, nor any of her descendants, shall be capable of inheriting, until all his male paternal ancestors, and their descendants shall have failed; and that no female paternal

ancestor of such person, nor any of her descendants, shall be capable of inheriting, until all his male maternal ancestors and their descendants shall have failed:" (sect. 7.) And by the section next immediately following, it is further enacted, "that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and when there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."

Devise to heir would formerly have been void, and he would have taken by descent.

Under the old law, a devise by a testator to his heir-at-law would have been void, the heir in such case taking by descent as his better title; and so the law still remains with respect to the heirs of all testators who died previously to the year 1834: (stat. 3 & 4 Will. 4, c. 106, s. 11.) The reason assigned that the heir should take by descent, and not by the devise, was, that the former conferred a better title by taking away the entry of such as might possibly have a right to his estate; whereas, if he had claimed by devise, he would, being in only as a purchaser, have been deprived of this advantage: (*Cholmley's case*, Dyer, 124, pl. 38; Plow. 545; 1 Roll. Abr. 626; Cro. Eliz. 833; Vaughan, 721; Gilb. Dev. 110; *Badger* v. *Lloyd*, 1 Lord Raym. 523, 527: 1 Salk. 233; Com. 62; *Smith* v. *Triggs*, 1 Str. 487; *Hurst* v. *Winchelsea* (*Earl of*), 2 Bur. 879: 1 W. Blackst. 187.) This construction was indeed carried so far, that a devise to the heir for life, if there was no limitation over, would have been void, his life estate merging in the fee, which

being undisposed of, was thus left to descend upon him: (3 Leon. 26.) So also a limitation to the heir in fee, after an estate tail (*Nottingham* v. *Jennings*, 1 Salk. 234), or an estate for life (*Preston* v. *Holmes*, Sty. 148; 1 Roll. Abr. 626), would have been void, and the heir would have taken by descent, and not under the will. In like manner, also, a devise to the heir and another, as tenants in common, would have been void as to the heir, and he would have taken the moiety devised to him in precisely the same manner as if it had been left to descend upon him. And where lands were subjected by the will to a charge, with a devise over to the heir in fee, he would still, notwithstanding his estate was onerated with incumbrance, have taken by descent and not by purchase: (*Haynsworth* v. *Pretty*, Cro. Eliz. 833; S. C., Moor, 644; *Clerk* v. *Smith*, Com. 72; S. C. 1 Salk. 241; *Allam* v. *Heber*, Str. 1270; *Emerson* v. *Inchbird*, 1 Lord Raym. 728; *Chaplin* v. *Leroux*, 5 M. & S. 14; *Doe dem. Pratt* v. *Timins*, 1 B. & Ald. 530.) And the law would have been the same, although from the circumstances of the case it might have been more beneficial for the heir to have taken by purchase, than by descent: (*Hedger* v. *Row*, 3 Lev. 127.) And the rule applied equally to copyholds of inheritance, as to freehold estates: (Lord Raym. 4, 8, 829; *Doe dem. Pratt* v. *Timins*, *sup.*)

Estate limited in a different course of descent, would have rendered the heir a purchaser.

But where a different estate was given by the will from that which would otherwise have descended on the heir, the devise would then have been allowed to prevail, and the heir would have been in as a purchaser. As, for example, where a man devised to A. and B., his daughters and co-heirs in fee, who were, under those circumstances, held to have taken as purchasers, because, instead of the lands devolving upon them as co-parceners, they were created joint tenants

by the will, with benefit of survivorship: (*Bear's case*, Leon. 112; Co. Litt. 163 b.) And although, as we have already seen, a devise to the heir and another, as tenants in common, will not prevent the heir taking the moiety so devised to him, by descent, yet if the devise had been to him and another in fee generally, or as joint tenants in fee (in either of which instances an estate in joint tenancy would have been created), the heir would then have taken as a purchaser; because he would have taken a different estate from what would have descended on him, and transmissible in a different manner, viz., an estate in joint tenancy, subject to survivorship in a stranger. Also, in some cases, the devise was holden to be good in part and void in part; as where a man devised one moiety of Blackacre to B., his heir-at-law in fee, and the other moiety to him in tail, in which case the heir would have been construed to have taken the fee as heir by descent in the one moiety, and the estate tail as a devisee and purchaser in the other moiety: (2 Lord Raym. 830.) Whether the rule above laid down ought to extend to a testamentary appointment, does not appear to have been satisfactorily settled. In one case, indeed, it appears to have been decided that the rule did apply to a case of that kind: (*Hurst* v. *Winchilsea*, 2 W. Blackst. 187 ; S. C. 2 Bur. 879.) But the correctness of this decision has been much questioned, and it is very doubtful if it would be followed; still, the point has never since been determined. It appears, however, to have arisen in the case of *Baldwin* v. *Sneyd* (3 Bro. & Bing. 243), the opinion of the Court of Common Pleas, to which a case from Chancery was sent, being, that the will of the testatrix (the determination of whose coverture had enabled her to dispense with the power if she pleased), *did not operate as an appointment*, but took effect out of her ownership, and it became

unnecessary to decide the question: (see also 1 Jarm. Pow. Dev. 427, n. 2.)

Operation and effect of the statute.

As the law formerly stood, therefore, the heir would never have taken by purchase under his ancestor's will, where the interest devised to him would not have been inconsistent with that which would have devolved upon him in a due course of descent, either as the whole, or as to part, of the undisposed real property of such ancestor. In this respect the law is completely altered by the statute now under consideration, by the 3rd section of which it is enacted, "that when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and so absolutely is the heir now construed to take as a devisee, that assets will not be marshalled against him: (*Strickland* v. *Strickland*, 10 Sim. 374; see also *Biederme* v. *Seymour*, 3 Beav. 368.)

No descent cast will now toll a right of entry.

Previously to this enactment, the heir had been deprived of the advantages he would have derived from the descent, tolling, or taking away a right of entry, by an act passed in the same session (3 & 4 Will. 4, c. 27), which after abolishing, with some few exceptions, all real actions, enacts, "that no descent cast, discontinuance, or warranty that may happen or be made after the 31st day of December, 1833, shall toll or defeat any right, or entry, or action, for the recovery of land:" (sect. 39.)

Heirs shall take as purchasers, where lands are limited to them as the heirs of a particular person.

The remaining part of the 3rd section of the 3 & 4 Will. 4, c. 106, next proceeds to enact, "that when any land shall have been limited by any assurance executed after the said 31st day of December, 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to

have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

Lands acquired by purchase in a limitation to the heirs of the body of his ancestors, shall descend as if such ancestor had been the purchaser.

And by the section next immediately following (section 4), it is further enacted, "that when any person shall have acquired any land by purchase, under a limitation to the heirs, or the heirs of the body of any of his ancestors, contained in any assurance executed after the said 31st day of December, 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in any will of any testator who shall depart this life after the said 31st day of December, 1833, then, and in any of such cases, the land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land."

Act not to extend to any descent prior to 1834.

The 11th section of the statute, however, enacts, "that this act shall not extend to any descent which shall take place on the death of any person who shall die before the 1st day of January, 1834."

But the next section (sect. 12) enacts, "that where any assurance, executed before the said 1st day of January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then, the person or persons who would have answered such description of heir if this act had not been made shall become entitled, by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on the said 1st day of January, 1834."

Descendants of attainted persons were not capable of inheriting.

Under the old law, one of the consequences of attainder was the corruption and extinction of hereditary blood, so that the attainted person was not only incapable himself of inheriting, but also

obstructed the descent to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor. This, Blackstone remarks, was a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony: (Van Leeuwen, in 2 Feud. 31; 2 Blac. Com. 254.) But, by the law of England, a man's blood was considered to have been so universally corrupted by attainder, that his sons could neither have inherited to him nor to any other ancestor (Co. Litt. 391), at least on the part of their attainted father. This corruption of blood could not have been absolutely removed but by the authority of Parliament. The king might, indeed, have excused the public punishment of the offender, but he could not have abolished the private right which had accrued to individuals as a consequence of the criminal's attainder. If, therefore, a man had a son, and was attainted, and was afterwards pardoned by the king, this son could never have inherited to his father, or his father's ancestors; because his paternal blood, being then considered as once thoroughly corrupted by his father's attainder, must continue so. But if the son had been born after the pardon, he might then have inherited; because, by the pardon, the father was made a new man, and might thus have conveyed newly inheritable blood to his children.

Hardship of laws relative to corruption of blood latterly viewed in an unfavourable light.

This corruption of blood, thus arising from feudal principles, was long looked upon as a peculiar hardship, because the oppressive part of the feudal tenures having been abolished, it seemed most unreasonable to preserve one of their most inevitable consequences; namely, that the children should not only be reduced to present poverty, but also laid under future difficulties of inheritance on account of the guilt of their an-

cestors. And, therefore, in most, if not all, of the new felonies created by act of Parliament since the reign of Henry the Eighth, it is declared that they shall not extend to any corruption of blood; and by the statute 7 Anne, c. 21 (the operation of which is postponed by the statute 17 Geo. 2, c. 39), it is enacted, that after the death of the late Pretender and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which provisions, Blackstone says, have indeed carried the remedy further than was required by the hardship above complained of; which is only the future obstruction of descents where the pedigree happens to be deduced through the blood of an attainted ancestor: (2 Blac. Com. 256.)

Attainder not to obstruct the tracing of a descent, unless the lands shall have escheated in consequence of such attainder.

And now, by the 10th section of the statute 3 & 4 Will. 4, c. 106, it is enacted, "that when the person from whom the descent of any land is to be traced shall have any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have been escheated, in consequence of such attainder, before the 1st of January, 1834."

# CHAPTER VI.

## OF TITLES UNDER TENANTS FOR LIFE AND TENANTS PUR AUTRE VIE.

I. Of Life Estates.
II. Of Estates pur autre Vie.
III. General Practical Observations.

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### 1. Of Life Estates.

Every person taking a life estate in real property acquires a freehold.

Whenever a person takes an estate in real property, either for his own life, or the life of any other person, he acquires an estate of freehold, and is in legal strictness styled a tenant for life. But by common speech, where he holds for his own life he is called tenant for the term of his life, and when he holds for the term of another man's life he is styled a tenant *pur autre vie*: (Litt. s. 56, 381.) The same person may, however, possibly fill both characters, as he may hold for the term of his own life and also for that of some other person: (Co. Litt. 41, b.) As, if a lease was made to A. for the term of his own life, and the lives of B. and C.; in this case, A. is tenant for life, and though he holds for the lives of several yet he has but one freehold, viz., a freehold determinable on the death of the survivor of him and the *cestuis que vie*: (*ib.*) One of the consequences arising from this distinction is, that during the lives of B. and C. there can be no merger of the freehold into A.'s estate for life; because, though an estate for a man's own life is, as has been before observed (*ante*,

Distinction between estates for life and estates *pur autre vie*.

p. 408), greater than an estate for the life of another, yet as A. has, in this instance, only one freehold circumscribed by the life of himself and two others, that doctrine does not here apply, as it would most undoubtedly have done, if A., who was tenant for life in remainder, had purchased a preceding estate which was determinable on the lives of B. and C.; because, in the latter instance, there would have been two freeholds, viz. the estate determinable on the deaths of B. and C., and A.'s own life estate in remainder expectant thereon; when upon the principles before laid down (*ante*, pp. 407, 408), the estate *pur autre vie*, being the lesser, must have become merged in A.'s estate for life, which is the greater estate: (*Brudnell's case*, 5 Co. 9, b.; *Rope's case*, *ib.* 13, a.)

Practical suggestions upon the investigation of titles of tenants for life.

In investigating the titles of tenants for life, the chief points to which the attention should be directed are, first, to see that the estate is properly created; next, that the grantor had the power to create such estate; and then to ascertain that the tenant for life has done no act to incur a forfeiture. If a rent is reserved, it must be ascertained that it does not exceed the specified amount; and where the estate is determinable on lives, it must be proved that the lives are still in existence.

That the estate is properly created.

Estates for life, whether of the party himself, or *pur autre vie*, being of a feudal nature, were conferred by the same feudal rights and solemnities and the same investiture by livery of seisin, as estates of inheritance and at the present day can only be created or transferred from one party to another by the same modes of assurance as are requisite for passing estates of the latter description. With respect to the expressions necessary to create an estate for life, the most apt and proper way, both in deeds and wills, is to limit the estate to the party expressly

for his life ; though in a deed (see *ante*, p. 304), and until recently in a will, a general limitation, without mentioning any particular estate, would have passed that interest : (Litt. s. 238 ; Co. Litt. 42 ; 1 Roll. Abr. 846 ; *Pettiward* v. *Prescott*, 7 Ves. 540.) Yet, in some instances, as I shall have occasion to notice hereafter, a life estate *may, in the case of a will*, arise by mere implication, without any words of express devise, as it may also result in a deed under the operation of the Statute of Uses. And where an estate given to a person generally was made determinable on the happening of some specified event, yet, if such event was uncertain and no fixed time was appointed for the determination of the estate conveyed, it passed a life interest in the property ; as where an estate is given to a woman during widowhood, or to a man and woman during coverture, or as long as the grantee should live in a particular house, or should pay 10*l.* yearly to the grantor, but subject to determination upon the happening of the contingencies within the above period : (Co. Litt. 42, a ; 1 Roll. Ab. 844, N. pl. 2.)

As to wills.

Until the recent act (1 Vict. c. 26), a simple devise of landed property to a party, by name, would have given him a mere life estate, and no more : (*Roe dem. Fox* v. *Blackett*, Cow. 235 ; *Denn* v. *Gaskin*, *ib.* 657.) Hence, where a testator devised Blackacre to his daughter J. in tail, and proceeded, "Item, I devise unto my daughter Whiteacre," she was held to take an estate for life only in Whiteacre, this being a distinct and independent devise, without any reference to that which preceded : (1 Roll. Abr. 369 ; Moor. 152 ; Yelv. 209 ; 1 Mod. 100 ; 3 Bulstr. 137 : see also *Compton* v. *Compton*, 9 East, 267.) And in a more recent case (*Price* v. *Archbishop of Canterbury*, 14 Ves. 634), where a devise was as follows : "I give to A. my farm

and lands at R., to him, his heirs and assigns for ever, and I also give to A. my farm and manor of E.," it was held that an estate for life only passed in the manor of E. : (see also *Pettiwood* v. *Cook*, 2 Leon. 129 ; S. C. Cro. Eliz. 52 ; *Woodward* v. *Glassbrook*, 2 Vern. 388 ; *Roe* v. *Holmes*, 2 Wils. 80; *Denn* v. *Gaskin*, Com. 657 ; *Roe* v. *Bolton*, 2 Blackst. 1045 ; *Right* v. *Sidebottom*, Doug. 759 ; *Hay* v. *Coventry* (*Earl of*), 3 T. R. 83 ; *Goodtitle dem. Richardson* v. *Edmonds*, 7 T. R. 635 ; *Doe dem. Child* v. *Wright*, 8 T. R. 64 ; *Doe dem. Small* v. *Allen*, 8 T. R. 497 ; *Moor* v. *Denn*, 2 Bos. & Pull. 247.) Unless, therefore, the words of devise imported in substance something more than a mere description of the devised property, an estate for life only would have been held to pass; hence, words tending to disinherit the heir would not have been sufficient to have enlarged the terms of a devise, which, for want of proper words of limitation, or words tantamount, was incapable of passing the inheritance to anybody else : (*Right* v. *Sidebottom*, Doug. 734.) But now, as to the wills of testators who have died subsequently to 1838, the fee will pass under a simple devise of the property, without any words of limitation whatever, unless a contrary intention is expressed by the will (1 Vict. c. 26, s. 27); so that now, so far from words of limitation being essential to pass the fee, they are absolutely necessary to restrict the devise to a lesser interest. But as to wills of testators who died previously to the year 1838, the law remains precisely as it was before ; consequently, the subject we have been considering must remain an important one for many years to come.

When an estate for life will arise by implication.

An estate for life may arise by mere implication of law, without any express words of devise to the party. Thus, where a man devised to his heir-at-law, after the death of his wife, she

was held to have taken an estate for life by implication, although nothing was devised to her by express terms ; because the intent of the testator undoubtedly was to postpone the heir until after the death of his wife, and if she did not take it, the heir must have done so : (Year Book, 13 Hen. 7 ; 1 Eq. Ca. Abr. pl. 1 ; *Smartle* v. *Scholler*, T. Jones, 98 ; *Gardiner* v. *Sheldon*, Vaugh. 259; *Falkner* v. *Falkner*, 1 Vern. 22 ; *City of London* v. *Galway*, 2 *ib.* 572 ; *Upton* v. *Ferrers* (*Lord*), 5 Ves. 804 ; *Dashwood* v. *Peyton*, 18 *ib.* 40 ; *Aspinall* v. ———, 1 Sim. & St. 544 ; *Doe dem. Driver* v. *Bowling*, 1 B. & Ald. 722.) And, it seems that the same implication arises in the case of a devise to one of several coheirs : (*Hutton* v. *Simpson*, 2 Vern. 723 ; *Willis* v. *Lucas*, 1 P. Wms. 472.) But no such implication would have arisen in case the limitation over on the wife's death had been to a stranger, and, in that case, the estate in the meantime would have descended on the heir : (*Falkner* v. *Falkner*, 1 Vern. 22; *City of London* v. *Galway*, 2 *ib.* 572 ; *Upton* v. *Ferrers* (*Lord*), 5 Ves. 804 ; *Aspinall* v. ———, 1 Sim. & St. 544.) The implication in favour of the wife would also be rebutted, if part of the lands devised to the heir after her death, were expressly devised to her for life, and in such case she would take nothing by implication in the remaining lands, the reference to her death being then considered to relate merely to such lands as were before devised to her for life : (*Simpson* v. *Hornsby*, Gilb. Eq. Rep. 115, Pre. Cha. 439; *Cook* v. *Gerrard*, 1 Lev. 212; *Boon Cornforth*, 2 Ves. sen. 277; *Dyer* v. *Dyer*, 1 Mer. 414; *Annandale* v. *Brazier*, 5 B. & A. 54.)

Doctrine of life estates arising by implication extends only to wills.

The doctrine of estates arising by implication, it must also be observed, only extends to wills, for in the instance of deeds no such intention will be presumed unless expressed;

consequently, no estate can possibly arise unless there be a limitation to create it (*Seagood and Hone's case*, 1 Co. 1; *Gardiner* v. *Skelton*, Vaugh. 261; 1 Eq. Ca. Abr. 196; 2 Lev. 79; *Idle* v. *Cook*, 2 Lord Raym. 1152); unless, indeed, where it results to the grantor as part of a use that is undisposed of; a subject we will next proceed to consider.

When an estate for life will result.

It has already been stated (see *ante*, p. 287), that where no uses are declared, or, as to so much of them as are not declared, they will result back to the original owner. Thus, where A. seised in fee covenanted to stand seised to the use of his heirs male, begotten, or to be begotten, on the body of his second wife, it was, upon the principle just alluded to, held by Hale, C. J., and two other justices, that the use, being undisposed of during A.'s lifetime, must, as a necessary consequence, result back to him during that period: (*Pibus* v. *Mitford*, 1 Ventr. 372.) In *Wills* v. *Palmer* also (2 Burr. 2615), where there was a limitation of the use for several estates for life and in tail, prior to the limitation to the use of the heirs of the body of the person out of whose estate the uses arose, but there was not any estate for the exact period of the life of that person, it was held that an estate for life resulted to such former owner of the property.

No estate can result to any one, except the owner of the estate; nor where he takes an estate inconsistent with the estate alleged to have resulted.

But no estate can result to any person but the owner of the estate out of which the uses are limited to arise: (*Davies* v. *Speed*, 2 Salk. 679.) Nor can it be implied in favour of that person when he has an estate by express limitation inconsistent with the estate that is alleged to have resulted to him. Hence, no such inference will arise where the grantor takes a term of years under the limitation to uses, notwithstanding no use is declared of the freehold until after his death. Thus, for example, where the use was limited to the grantor himself for ninety-

nine years, remainder to the use of trustees for twenty-five years, remainder to the use of the heirs of his own body, remainder to his own right heirs, it was held that no implication could arise contrary to the intent of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like *Fenwick* (should be *Pibus*) *and Mitford's case*, where the owner covenanted to stand seised to the use of the heirs of his body; and Powell, J. held, that even in that case, if there had been an express estate limited to the covenantor, it would have been different: (*Adams* v. *Terre-tenants of Savage*, 2 Salk. 679.) So, where A., by marriage settlement, conveyed certain lands to the use of himself for ninety-nine years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs; upon a case referred to the judges of C. B. from the Court of Chancery, they held the limitation to the heirs male of the body of A. void, no freehold being limited to any person precedent to that estate; and that an estate of freehold could not possibly result back to A. for life, because another estate, viz. for ninety-nine years, was expressly limited to him, which would be inconsistent with an estate of freehold: (*Rawley* v. *Holland*, 2 Eq. Ca. Abr. 733.)

Where an estate for years is limited to some other person than the owner, an estate may result back to him.

But where the estate for years is limited to some other person than the author of the uses, then an estate may result back to him; as in *Penhay* v. *Hurrel* (2 Vern. 370; 2 Freem. 258), where a conveyance was made by A. to the use of trustees for seventy years if A. should so long live, remainder to trustees for 3,000 years, and from and after the death of A., to B., his son, for life, with remainder over. The objection was, that the limitation to B., together

with the remainders over, were void, being an estate of freehold to commence *in futuro;* for the first freehold estate was limited to B., which was not to arise until after the death of A., and no estate for life was limited to A., unless an estate for life should be supposed to result back to him. After solemn argument upon the point, and the case stated to the judges, it was decreed that an estate for life did result to A., and supported the limitation over: (Fearne C. R. 196.)

*Aliter*, where the use is expressly limited away during the lifetime of the grantor.

Yet, where the use was expressly limited away during the life of the grantor, instead of for years only, it was there held that there could be no solid ground for contending that any estate resulted back to him: (*Tippin* v. *Cosin*, Carth. 272; 4 Mod. 380.)

## SECTION II.

### OF ESTATES PUR AUTRE VIE.

As to estates *pur autre vie.*

AN ESTATE *pur autre vie* may arise either by a person acquiring the interest of a tenant for life, or from the property being limited to him for the life of one or more persons. The devolution or course in which an interest of this kind is transmissible, will depend entirely upon the terms in which such interest is created. If limited to a man and his heirs, or to a man, his heirs, executors, administrators, and assigns, in that case his heirs would be the persons to succeed him in the possession of the property : (*Atkinson* v. *Baker*, 4 T. R. 229.) If limited to a man and his executors, or simply to the party himself, it will then, upon his decease, devolve upon his personal representatives, and be distributable as personal estate: (*Atkinson* v. *Baker*, 4 T. R. 229; *Ripley* v. *Waterworth*, 7 Ves. 425.) And if limited or devised for a partial purpose, not exhausting the whole interest in the premises ; as where a life interest is given which determines before the estate *pur autre vie*, it will revert to the grantee, or the persons entitled to be his special occupants, and to the executors or administrators, if he be not so named: (*Doe dem. Jeff* v. *Robinson*, 8 B. & C. 296.)

Estates *pur autre vie* not devisable

Estates *pur autre vie* were not, however, devisable under the Statute of Wills (32 Hen. 8, c. 1),

under Statute of Wills, but rendered so by Statute of Frauds.

but they were rendered so by the Statute of Frauds (29 Car. 2, c. 3), by a will signed by the testator, or by some other person in his presence, and by his express direction attested and subscribed by three or more credible witnesses; and if no devise thereof shall be made, it proceeds to enact, that the same shall be chargeable in the hands of the heir, if the same shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee-simple; and in case there shall be no special occupant thereof, that it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands: (sect. 12.)

Stat. 14 Geo. 2, c. 20.

Some doubt, however, having arisen as to whether, upon the construction of the Statute of Frauds, although it was necessary to have three witnesses to a will to pass the legal interest in an estate *pur autre vie*, yet where no special occupant had been named, the personal representatives of the party would have taken by an equity attaching upon them in that character; for the purpose of settling this point the statute 14 Geo. 2, c. 20, was passed, by which, after reciting that such doubts had arisen, it is enacted, "that such estate *pur autre vie*, in case there shall be no special occupant thereof, of which no devise shall have been made according to the Statute of Frauds, shall be applied as personalty:" (sect. 9.)

Whether under stat. 14 Geo. 2, c. 20, personal representatives having satisfied debts are to distribute the residue as personalty.

As the latter statute (14 Geo. 2, c. 20), however, only applied to those cases in which there was no special occupant, a question again arose as to whether the personal representatives, having satisfied debts, were compelled to distribute the residue as personalty: (*Westfaling* v. *Westfaling*, 2 Atk. 460; *Williams* v. *Jekyll*, 2 Ves. sen. 683; *Atkinson* v. *Baker*, 4 T. R. 229.) But at length Lord Eldon de-

cided that, after satisfaction of debts, it was distributable as personal estate (*Ripley* v. *Waterworth*, 7 Ves. 425); and this decision seems to have settled the question: (*Fitzroy* v. *Howard*, 3 Russ. 225.)

How estates *pur autre vie* are devisable.

Estates *pur autre vie* are mentioned amongst the estates and interests devisable under the statute 1 Vict. c. 26, and will pass under a general devise of the testator's real estate: (sects. 3, 26.)

## SECTION III.

### GENERAL PRACTICAL OBSERVATIONS.

It must be ascertained that the grantor had the power to grant the estates.

In investigating a title to an estate for life, it will be necessary to ascertain, not only that the assurance which creates it is sufficient for the purpose, but also that the grantor had sufficient power to confer that interest; for such persons as have merely limited interests, as tenants in tail, for life, or for years, cannot create any estate that will endure for a longer period than their own interests in the premises. It is true, if a person was possessed of a long term, as 500, or 1,000 years in lands, and was to grant them to a party for life, the term would be certain to endure longer than the estate so granted; but for all this, no estate of freehold could possibly have passed by such grant, unless it had been effected by some tortious mode of assurance, as a feoffment, or the like, and then it would have operated as a forfeiture of the term. Where questions upon the validity of life estates most frequently arise is in the instance of powers contained in marriage settlements and in wills, which render it necessary in all cases of that nature to scrutinize the instrument by which such power is created, and then to see that all the terms prescribed by such power have been duly complied with.

What acts of a tenant for life will

The acts of a tenant for life which will cause

a forfeiture of his estate are, treason and felony, the civil crime of disclaimer, waste, and making tortious conveyances of the property. The subject of forfeiture for treason or felony has been already discussed. A disclaimer may be done by disclaiming to hold of the lord, either expressly or impliedly; as by claiming the reversion to himself, or accepting it as a gift from a stranger: (Cru. Dig. tit. 3, ch. 1, s. 38; Co. Litt. 25, b.) But a forfeiture thus occasioned may be waived by the subsequent acceptance of rent by the lord, with knowledge of the forfeiture having been incurred: (3 Leon. 271; Co. Litt. 102, a.)

Disclaimer will cause a forfeiture of his estate.

Forfeitures by conveying a larger estate than the tenant had in the premises could only have been incurred where some tortious mode of assurance was resorted to; as a feoffment, fine, or the like, and not when some innocent mode of assurance, as a bargain and sale enrolled, or a conveyance by way of lease and release, was adopted. Fines are, however, now abolished (stats. 3 & 4 Will. 4, c. 27 and 74); and as the recent enactment of the 8 & 9 Vict. c. 106, s. 4, deprives all assurances of a tortious operation, no mode of conveyance whatever can now create a forfeiture. But causes of forfeiture by tortious conveyances made previously to that act still remain in force, but will be barred at the end of twenty years: (3 & 4 Will. 4, c. 27, ss. 2, 3.)

Forfeitures by conveying a larger estate could only have been effected by a tortious mode of conveyance.

But notwithstanding that an estate for life will be destroyed by forfeiture, merger, or surrender, yet an underlease granted out of such estate will still remain in force; for when it is propounded that derivative terms will cease with the determination of the estate out of which they are derived, this must be understood of their absolute determination by effluxion of time, or a collateral determination, as in the instance of a lease

Derivative estates not determinable by the merger or forfeiture of the original estates.

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to A. for ninety-nine years, if he shall so long live; or by a condition annexed by the parties to the original estate: (*Webb* v. *Russell*, 3 T. R. 393; 2 Prest. Convey. 135.)

Waste, Statute of.

The Statute of Gloucester (6 Ed. 1, c. 5,) enacts that a tenant for life, or years, by curtesy, or in dower, shall forfeit the thing he has wasted; upon the construction of which statute it has been determined that the thing wasted means the property upon which such waste has been committed: (2 Inst. 20; F. N. B. 139.) Still, in spite of this doctrine, proceedings for the forfeiture in case of waste have long since become obsolete, the modern remedy being an action upon the case by the reversioner to recover damages (*Gibson* v. *Wells*, 1 Bos. & Pull. 290; *Harrow School* v. *Alderton*, 2 Bos. & Pull. 36); and an injunction in equity to restrain further injury: (Co. Litt. 23, b; *Abrahall* v. *Bubb*, 2 Freem. 63, 278; *Williams* v. *Day*, 3 Cha. Cas. 32; *Whitfield* v. *Bewett*, 2 P. Wms. 242; *Clark* v. *Thorpe*, 2 Ves. 233; *Robinson* v. *Litton*, 3 Atk. 211; *Hanson* v. *Gardiner*, 7 Ves. 310.)

Tenant for life without impeachment of waste.

But a tenant for life, without impeachment of waste, although it was formerly considered that he was only exempted from the penalties of the Statute of Gloucester (6 Edw. 1, c. 5), yet, as long since as *Lewis Bowles' case* (11 Rep. 79) was determined, it was considered that the clause, without impeachment of waste, gave the property itself: (*Alston* v. *Alston*, 2 Ves. 265, 266.) Still, for all this, courts of equity will grant an injunction to restrain a tenant for life from the commission of any waste that is likely to be of permanent injury to the inheritance: (*Vane* v. *Barnard* (*Lord*), 2 Vern. 738; Pre. Cha. 454; 1 Ves. 625; *Abrahall* v. *Bubb*, 2 Freem. 53; *Perrot* v. *Perrot*, 3 Atk. 95; *Robinson* v. *Litton*, 3 Atk. 210.)

Ornamental timber.

The acts which a court of equity has restrained a tenant for life,

without impeachment of waste, from committing, are, the cutting down of ornamental timber (*Packer* v. *Bolingbroke*, referred to 1 Mad. Pr. 141; *Packington* v. *Packington*, 3 Atk. 215; *Aston* v. *Aston*, 1 Ves. 264; *O'Brien* v. *O'Brien*, Amb. 107; *Strathmore* v. *Bowes*, 2 Bro. C. C. 88); and all timber planted for ornament must be so considered (*Mohun* (*Lord*) v. *Stanhope* (*Lord*), Rolls, 9 March 1808, 1 Mad. Pr. 143); and this, even if planted for that purpose by the tenant for life himself (—— v. *Copley*, referred to 1 Mad. Pr. 144.) The circumstance, however, of timber being ornamental to the property will not of itself be sufficient to constitute what in the eye of a court of equity is considered ornamental timber. To render it so, it must be planted for that express purpose; such as vistas, or avenues, or trees planted for the purpose of excluding objects from view: (*Burgess* v. *Lambe*, 16 Ves. 183; *Day* v. *Merry*, *ib.* 375; *Coffin* v. *Coffin*, 1 Jac. 70.) In other respects, a tenant for life unimpeachable for waste may cut down timber generally, treating it in a husbandlike manner, with regard to the beauty of the place (*Burgess* v. *Lambe*, 16 Ves. 185); still this will not empower him to cut down trees that have not arrived at a proper degree of maturity, though he may doubtless thin them in such a manner as to assist the growth of the rest: (*Perrot* v. *Perrot*, *sup.* 1 Mad. Pr. 144.) A tenant for life, without impeachment of waste, may be restrained from opening mines or quarries (*Whitfield* v. *Bewett*, 2 P. Wms. 242; *Tracey* v. *Hereford*, 2 Bro. C. C. 128); but not from working mines or quarries already opened: (*Saunders's case*, 5 Rep. 12.) And even new pits may be opened for the purpose of working old mines: (*Clavering* v. *Clavering*, 3 P. Wms. 388.) An injunction will also be granted to restrain a tenant for life from pulling down

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houses (*Vane* v. *Barnard* (*Lord*), 2 Vern. 738), or suffering them to remain uncovered: (*Abrahall* v. *Bubb*, 2 Freem. 53.)

What persons are considered in the same light as tenants for life.

A tenant in tail, after possibility of issue extinct, is looked upon in the same light as a tenant for life without impeachment of waste, for it is impossible that under any circumstances his estate can endure beyond that period: (*Bowles* v. *Bertie*, 11 Rep. 84; *Abrahall* v. *Bubb*, 2 Freem. 53, 278; *Williams* v. *Day*, 2 Cha. Cas. 32; *Williams* v. *Williams*, 12 East, 221; 15 Ves. 427.) The estate of a tenant by the curtesy is even more limited than this, for he is considered as an ordinary tenant for life, liable to impeachment for waste, and subject to all the incidents of a simple life estate; as is also the interest of a tenant in dower: (3 Rep. 23, b; Co. Litt. 53, a.)

Importance of ascertaining the existence of the lives.

One of the most important points connected with the sale of leasehold property dependent on lives is to ascertain whether or not such lives were in existence at the time of signing the contract. Too strict an inquiry cannot be made in cases of this description, because, if any of the lives should happen to drop after signing the contract, and before its completion, the loss must fall upon the purchaser. In *White* v. *Nutt* (1 P. Wms. 61), however, Lord Keeper Wright seems to have considered, that although where some of the lives dropped between the contract and the conveyance, the loss must be borne by the purchaser, yet that, if all the lives had dropped, it might have been otherwise, for that then, no estate being left, there could be no conveyance. In coming to this conclusion he seems to have lost sight of the principle by which cases of this kind are governed, viz., that in equity that which was agreed to be done is considered as actually performed; for hence it is that, as soon as the agreement is signed, the purchaser must stand by

the profit and loss of his bargain. If a person were to sign a contract for the purchase of real property upon which a rich mine was afterwards discovered, he would be entitled to the full benefit of it, and though the value of the estate might be thereby increased one hundred fold the vendor would neither be entitled to rescind the contract on that account, nor to obtain one penny in addition to his purchase-money, or if the consideration for the purchase was an annuity for life, and before any portion of the annuity becomes payable the annuitant were to die, so that the vendee would have nothing to pay for his purchase, the contract could not be rescinded upon that account: (*Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Jackson* v. *Lever*, 3 Bro. C. C. 306; *Paine* v. *Meller*, 9 Ves. 246.) So upon the same principle he must bear all intermediate losses; and therefore if the property be overwhelmed by an inundation, consumed by fire (*Pain* v. *Mellor*, 6 Ves. 349; *Ex parte Minor*, 11 Ves. 562; *Hunter* v. *Wilson*, 2 Coll. of Decis. 56; *Atchison* v. *Dickson*, *ib.*; *Zagury* v. *Jackson*, 2 Camp. N. P. C. 240), or swallowed up by an earthquake, he must equally abide the loss: (*Cass* v. *Rudele*, 2 Vern. 280; *Poole* v. *Shergold*, 2 Bro. C. C. 118; *Revell* v. *Hussey*, 2 Ball & Bea. 280; *Harford* v. *Purrier*, 1 Mad. 352. See also *Minchin* v. *Nance*, 4 Beav. 332, 341; and see also *Foster* v. *Deacon*, 3 Mad. 394; *Binks* v. *Lord Rokeby*, 2 Swanst. 222; *Ferguson* v. *Tadman*, 1 Sim. 530; *Lord* ——— v. *Stephens*, 1 You. & Coll. 222.) The same rule applies in like manner to the dropping of lives, such being one of the casualties to which property depending on lives is subject: so that whether one or all the lives die in the interim between the contract and the conveyance, the purchaser must be the losing party; and though a conveyance be unnecessary, he will not thereby

Destruction of property no ground for rescinding contract.

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be released from the payment of the purchase-money. At the same time it will be prudent to avoid all disputes from arising upon this subject, and to provide, in the conditions or contract, that none of the above circumstances are in anywise to affect the contract: (see the form. tit. Agreements, No. VI., clause 7, p. 131.)

Operation of stat. 19 Car. 2, c. 6, as to the evidence of existence of lives.

It is enacted by the statute of 19 Car. 2, c. 6, s. 2, "that if such person or persons, for whose life or lives such estates have been, or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, for seven years together, and no sufficient proof be made of their lives in any action for the recovery of such tenements by the lessors or reversioners, in such case they shall be accounted dead, and the judges shall direct the jury to give their verdict accordingly." Upon the construction of this section of the statute, it has been holden that the fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of the family, is *primâ facie* evidence of the death of the tenant for life: (*Doe dem. Lloyd* v. *Deakin*, 4 Barn. & Ald. 433; and see *Doe dem. Jesson* v. *Jesson*, 6 East, 85.) The 5th section of the above-mentioned statute, however, contains a proviso, "that if any person or persons shall be evicted, and afterwards such person shall return, or shall, on proof in such action aforesaid, be made appear to be living, or to have been living at the time of eviction, that then and from thenceforth the tenant or tenants who were ousted of the same, his or their executors, administrators, or assigns, may re-enter, re-possess, have, hold, and enjoy, the said lands or tenements in his or their former estate, during the life, or for so long term as the said person upon whose life the said estate or estates depend shall be living, and shall, upon action brought by them against the lessors,

reversioners, tenants in possession, or other persons respectively, who since the said eviction received the profits of the said lands or tenements, recover for damages the full profit thereof, with lawful interest from the time he or they were ousted and kept out of the said lands or tenements; and this as well in the case where the said person upon whose life such estate or estates did depend, are or shall be dead at the time of bringing such action as if they were living." By the statute 6 Anne, c. 18, also "any person claiming any estate in remainder, reversion, or expectancy, after the death of any person within age, married woman, or any person whatever, may apply to the Court of Chancery, and procure an order for the production of such person, and upon refusal, such person shall be taken to be dead; but if in any action such person shall appear to have been living, the party ousted may re-enter and recover damages for the profits during the time of such ouster."

Estates *pur autre vie* not liable to dower or curtesy.

Estates *pur autre vie*, notwithstanding they may be limited to a man and his heirs, even with a perpetual right of renewal, are not considered in the light of estates of inheritance; consequently neither dower nor curtesy can possibly arise out of them.

# CHAPTER VII.

## TITLES UNDER LEASES FOR YEARS.

I. Requisites to support a Valid Lease.

1. That Lessor has Power to grant.
2. Capacity of Lessee to receive.
3. That Lease is a Valid Instrument.
4. As to Reserved Rents.
5. As to the Covenants.

II. Titles to Subsequent Interests.

III. Of Assignments.

1. Modes by which Leasehold Property may be assigned.
2. How a Term of Years would be assigned by Deed.
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1. Practical Observations respecting.
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I. Requisites to support a Valid Lease.

1. That the Lessor has Power to grant
2. Capacity of Lessee to receive

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3. *That Lease is a Valid Instrument.*
4. *As to Reserved Rents.*
5. *As to the Covenants.*

Practical observations on the investigation of titles of estates for years.

IN titles of leasehold property the first point to which the attention should be directed, is to see that the original lease is good and perfect, and capable of creating the term. In order to be satisfied upon this important head, it must be ascertained, 1. That the lessor had the power to grant the lease. 2. That the lessee was of capacity to receive the lease. 3. That the lease itself is a valid instrument, containing the proper operative words; a sufficient description of the property; and creates the duration of interest which is professed to be granted. 4. That the reserved rent does not exceed the specific amount. 5. That the lease contains no burdensome covenants, stipulations or provisoes restricting the lessee from the due enjoyment of the demised property. And, 6. That the lessee has done no act to amount to a surrender, merger or forfeiture of his term. These observations can, however, only relate to the root or origin of the term, for where there have been any mesne assignments, wills, under-leases or other dealings with the property, every one of these transactions must be strictly investigated, and every document relating to them inspected. So where leases have been renewed, it will be requisite to see that the surrenders have been properly made; nor will this alone suffice, for the lessor's title subsequent to the original grant of the term will also require investigation, because any mesne incumbrance affecting the reversion would attach upon the new lease: (*Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.) And where the contract is for the purchase of renewable leaseholds, it must be ascertained either that a tenant-right of renewal has been established by custom, or that

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the lease creating the term contains the proper stipulations and covenants for renewal.

1. *That the Lessor has Power to grant.*

As to the granting power of the lessor. Lessor's title.

A purchaser of leasehold property is as much a purchaser, as far as that interest extends, as one who contracts to buy an estate in fee-simple, and cannot, therefore, be compelled to complete his purchase unless the vendor can produce such a title as will insure him the uninterrupted enjoyment of his term: (*Purvis* v. *Rayer*, 9 Price, 488; *Hodgkinson* v. *Wood*, 6 L. T. 451.) It will not, therefore, be enough, that the vendor produces the original lease, and deduces a good title through all the mesne assignments; for, before he can compel the purchaser to a specific performance of the contract, he must show such a title in the lessor as would enable him to create the term. This question was for a long time one of those points which, though continually discussed, still remained undecided, yet it is now settled that a vendor of a term cannot compel a specific performance unless he can show a good title in his lessor (*Rosewell* v. *Vaughan*, Cro. Jac. 196; *Lysney* v. *Selby*, 2 Lord Raym. 1118; *Keech* v. *Hall*, Doug. 21; *Waring* v. *Mackreth*, 11 Ves. 343; *Fielder* v. *Hooker*, 2 Mer. 424; *Purvis* v. *Rayer*, 9 Price, 488; *Souter* v. *Drake*, 5 B. & Ad. 992), except in those cases where the purchaser was, at the time he entered into the contract, aware of the vendor's inability to do so (*Spratt* v. *Jeffery*, 10 B. & C. 249); or there is a stipulation that the purchaser shall not require the lessor's title; but even then, if he could show that the vendor had not such an estate or authority as would have enabled him to grant the lease, he would not be compelled to fulfil his contract: (*Shepherd* v. *Keatley*, 1 Cro. Mees. & Ros. 117.) But it would not afford a

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sufficient ground for rescinding the contract to show that there was a flaw in the vendor's title, consisting of an unreleased incumbrance, which left the legal estate outstanding: (*Duke* v. *Barnett*, 2 Coll. 337.)

Still undecided whether purchaser can compel vendor to produce his lessor's title.

Thus the law appears to stand with respect to the vendor; but in the case of a purchaser seeking a specific performance, it still remains undecided whether, although he may rescind the contract for want of it, he has at the same time any right to insist upon the vendor producing his lessor's title; and, notwithstanding the question arose in one or two cases that came before Lord Eldon, he could never be prevailed upon to decide the point, but he seems to have inclined to the opinion that, in the absence of an express stipulation to the contrary, the purchaser had a right to call for the lessor's title: (*White* v. *Foljambe*, 11 Ves. 337; *Radcliffe* v. *Warrington*, 12 *ib.* 326; *Deverall* v. *Bolton*, 18 *ib.* 505.)

Rule as to lessor's title does not affect bishop's leases.

The rules above laid down respecting the production of the lessor's title do not apply to bishop's leases. This subject was very fully and ably discussed in the case of *Fane* v. *Spencer*, a short report of which may be found in a note to 2 Mer. Reports, 430. In that case an objection was taken by the defendant, the purchaser of an estate held on a lease for lives under the Bishop of Bath and Wells, on the ground that it was not shown by the abstract, or otherwise, that the bishop had any right to make the lease under which the plaintiff, the vendor, derived his title. The abstract commenced with a lease from the then bishop in 1763, since which the title was regularly deduced to the plaintiff. There was no condition in the particulars of sale that the purchaser should not require, nor the vendor be bound to produce, the title of the ground landlord. The Master, on a reference, reported in

favour of the title, and exceptions being taken to the report on the above grounds, they were argued at several times before the Vice-Chancellor. At last his Honour overruled the exceptions, on the ground that this was the case of a bishop's lease, and therefore distinct from the question which arises on ordinary leases, the statute prescribing the mode of granting, and the presumption arising from the use of the bishop's seal being equivalent to that which is founded on admission in the case of a copyhold. And even in the case of an ordinary lease, where a party had previously contracted for the purchase of the benefit of an agreement for the letting of a public-house, and also of the stock and good-will, and he entered into possession before the lease had been granted, paid part of the purchase-money, and mortgaged his interest, it was held that, after this mode of dealing, he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted: (*Haydon* v. *Bell*, 1 Bea. 642.)

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The title to leasehold property will not in all cases depend upon the ownership of the lessor; for it may also depend, either wholly or in part, on a power vested in such lessor, and, in the latter instance, the goodness of the lease will rest entirely upon the validity and due exercise of the power under which it is created (2 Prest. Conv. 135); as, for example, in the instance of leases granted by tenant in tail under the stat. 32 Hen. 8, c. 28, which empowers him to grant leases for three lives or twenty-one years, which will be binding on the issue in tail, but not on those in remainder or reversion. Now, in order to render such a lease valid, the terms of the statute must be strictly complied with. These require that the lease shall be made by indenture; that it shall begin presently, and not *in futuro;* and

Leases under powers.

Leases under stat. 32 Hen. 8, c. 23.

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that it must be *either* for three lives, *or* twenty-one years, but not for both; yet it may be for a shorter period than either the three lives or the twenty-one years, and would therefore be good if made for two lives, or even for one, or for fifteen, ten, or any lesser number of years within the period prescribed by the statute (*Harris* v. *Zouch*, 1 Keb. 347; *Briers* v. *Boulton*, 3 *ib.* 745; *Zouch dem. Woolston* v. *Woolston*, 2 Burr. 1146; *Isherwood* v. *Olknow*, 3 Mau. & Selw. 382); and a power to grant leases for lives will confer an authority to grant them during the life of the survivor (*Baugh* v. *Haynes*, Cro. Jac. 76; *Alsop* v. *Pyne*, 3 Keb. 44; *Doe* v. *Halcombe*, 7 T. R. 13; *Doe* v. *Hardwicke*, 10 East, 549); which, after all, amounts to nothing more in fact than the power itself expresses; because for three lives generally, or for three lives and the longer liver of them, is all one; since without any such expressions it must have enured to the survivor: (Woodf. Land. and Tenant, 125, 2nd edit.)

*How far leasing power is confined to corporeal hereditaments.*

This leasing power, it must be observed, is confined to corporeal hereditaments, and does not extend to tithes, rent-charges, or the like. The lands also must have been letten for above half the time, or eleven years out of the twenty (2 Blac. Com. 319), either for life, or years, at will, or by copy of court roll. And if there be an old lease in being, it must be first absolutely surrendered, or be within a year of expiring. Another requisite is, that the most usual or customary rent for twenty years be reserved, and also that the lessees be not made dispunishable for waste.

*What will be considered as the usual customary rent.*

With respect to what is to be considered as the usual or customary rent, Lord Holt says that it means the rent which was reserved when the power was created if a lease were then in being, or that which was last reserved, if no lease was in being: (3 Cha. Rep. 635.) Lord Cowper, how-

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ever, suggested that if lands were leased once at a greater, and twice at a lesser, rent, he should consider the rent of the former lease to be the ancient rent; for the last might be by the person who had the fee, who would not be bound to reserve the ancient rent, but might let it for nothing if he pleased. He also said that this rule could not apply to lands anciently demised, where fines had been taken; for there the rents were more or less in proportion as the fines were higher or lower: (4 Com. Dig. 192; Watk. Conv. by Merrifield, 365.) The rent, also, which is reserved must be the rent of the property of which the lessor is so seised in tail, and not of that and any other kind of property; for if a tenant in tail reserve an entire rent upon a farm, in which some leasehold and fee-simple tenements are mixed with the entailed lands, the lease will not be a valid one within the statute: (*Rees and Parkin* v. *Philp*, Wight. 69.)

Leases under stat. 32 Hen. 8, how determinable.

But notwithstanding that leases under the statute 32 Hen. 8, would have become determinable by the failure of issue inheritable under the entail, they are not to be considered as terms for a given number of years if the tenant in tail shall so long live, and the heirs of his body so long continue, but should be treated and assigned as absolute interests, and in fact would actually have become so to all intents and purposes, and have been equally binding and conclusive on the remainder-men and reversioner, as on the tenant in tail himself and his issue, in case the tenant in tail had suffered a recovery (Dy. 51, b; in marg. Bac. Abr. Lease, D.; 2 Prest. Conv. 131); and the same effect, it is apprehended, would now be produced by an assurance under the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), if such assurance was capable of barring the ulterior limitations to take effect after or in defeasance of such estate tail: (sects. 15, 19.)

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Although a term granted by a tenant in tail to commence at a future day is an invalid lease within the statute of 32 Hen. 8, still, if it be limited to commence during the lifetime of the tenant in tail, it will not only be personally binding on the lessor, but also upon his alienee, upon a husband tenant by the curtesy, or wife tenant in dower (*Bedford's case*, 7 Co. 72; Bac. Abr. Lease D.; Dy. 46, b; 2 Prest. Conv. 132); and even as far as regards the issue in tail, the lease will only be voidable, and not actually void, and may therefore be confirmed by them. But if the term be limited to commence after the death of the tenant in tail, it will be absolutely void, and thus incapable of confirmation: (*Jones* v. *Verney*, Willes, 169; *Doe* v. *Watts*, 7 T. R. 82.)

Voidable lease by tenant in tail how far personally binding.

Leases under ordinary powers.

Leases under the usual and ordinary powers of leasing can only be made in pursuance of the terms prescribed by the power. Still, for all this, a power to lease for lives *or* years may be well executed by a lease, either absolutely for certain lives, or a certain number of years, or conditionally for a number of years determinable on a life or lives: (*Commons* v. *Marshall*, 6 Bro. P. C. 168.) See also, as I have just before remarked, where one was empowered to make leases for the lives of three persons, it enabled him also to lease during the life of the survivor; yet a power to make a lease for three lives was held not to be well executed by a lease for ninety-nine years determinable on three lives; the reason of which was, that the estate demised did not pursue the terms of the power, which was to grant a freehold lease, whereas that which was actually demised was a mere chattel interest (*Paine's case*, 8 Co. Rep. 69, 70, b; *Rattle* v. *Popham*, Str. 992; Woodf. Land. and Tenant, 125, 4th edit.); nor will a person be allowed to exceed the extent of his power; consequently if a person has a power to lease for twenty-one

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years, this does not authorize him to lease for twenty-six, and if he were to do so, the lease would be absolutely void at law (Fitz. 157; Hard. 398; *Parry* v. *Brown*, 2 Freem. 171; 3 Cha. Rep. 310; *Roe dem. Brune* v. *Prideaux*, 10 East, 158); but in equity it is only void as to the excess, and will therefore be sustainable in that court as an effectual exercise of the power for the twenty-one years: (*Campbell* v. *Leach*, Ambl. 740; *Commons* v. *Marshall*, 7 Bro. P. C. 111.) Yet although equity will treat the term as good *pro tanto*, where it exceeds in point of duration the limit prescribed by the power, it will not extend the principle so far as to support a lease which is void at law, on account of containing stipulations, provisoes or covenants wholly unwarranted by the power. Thus, where a tenant for life was empowered to grant leases to contain usual and reasonable covenants, and a covenant was contained in the lease that, in case the premises were blown down, or burnt down, the lessor should rebuild, or the lessee might quit; the tenant for life having died, the remainder-man brought an ejectment against the lessee, on the ground that this was a covenant not usual and reasonable; and the jury on the trial having found that such was *an unusual and unheard-of covenant* on the part of the lessor, the lessee was evicted. The latter afterwards filed his bill in the Court of Exchequer against the remainder-man to have the unusual covenant struck out of the lease, but the court dismissed the bill.

How far lease void at law for exceeding power will be sustainable in equity.

Where the lessor has power.

It has sometimes happened that where a person has had both a power of appointment over, and also an interest in, the property, he has granted a lease for a term absolute, without in any way referring to his power. Now it seems that, in a case of this kind, if his interest is such as, independently of the power to enable him to

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grant such a lease, the term will be held to pass out of his interest and not by force of the power. But if, on the other hand, he creates a term which may in point of duration exceed his interest in the property, as in the instance of a tenant for life, with a power to grant leases, granting a term absolute without referring to his power, it would be construed to operate as an execution of his power: (*Rogers's case*, 1 Ventr. 228, cited; *Leicester's* (*Earl of*) *case*, *ib.* 278; *Thomlinson* v. *Dighton*, 10 Mod. 31; *Campbell* v. *Leach*, Amb. 740.) Yet if a person has both a power and an interest over different estates, and reciting his power over one of the estates, he executes it in a formal manner, and then merely recites that he is seised in fee as to the other estate, without in any way referring to his power, and conveys accordingly, the former estate would of course pass by force of his power; but the latter would pass out of his interest, because there is no apparent intention to execute the power as to that portion of his property: (*Maundrell* v. *Maundrell*, 7 Ves. 567; 10 *ib.* 246; *Roe dem. Berkeley* v. *Archbishop of York*, 6 East, 86; *Boughton* v. *Sandelands*, 3 Taunt. 342; see also *Adney* v. *Field*, Ambl. 654.)

*Where power is limited to leases in possession.*

It has been decided that a general power of leasing, without expressing that the leases shall be only in possession, will not authorize the granting a lease in reversion or *in futuro*: (*Suffolk* (*Countess of*) v. *Wroth*, Cro. Eliz. 5; *Skecomb* v. *Hawkins*, Cro. Jac. 318; *Opie* v. *Thomasins*, 1 Lev. 267; *Bucks* v. *Antrim*, Sid. 101; *Doe* v. *Cavan* (*Lady*), 5 T. R. 567; *Doe dem. Allen* v. *Calvert*, 2 East, 367; *Bowes* v. *Waterworks Company*, 3 Madd. 375.) But a lease to commence from the date, or the day of the date, will be considered as a lease in possession: (*Clayton's case*, 5 Rep. 1; *Higham* v. *Coles*, 2 Roll. Abr. 251; *Pugh* v. *Leeds* (*Duke*

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*of*), Cow. 714.) In several cases, also, in which the subject has been discussed, the judges have expressed an opinion, that if there be a power to grant leases generally, a concurrent lease to commence immediately will be valid, provided the estates for life or years limited in all the leases do not exceed the number of lives or years allowed by the power, although the lands are then held under an existing lease made either by a former proprietor or the person making such lease: (*Berry* v. *Rich*, Hard. 412; *Read* v. *Nash*, 1 Leon. 147; *Goodtitle* v. *Funucan*, Doug. 565.) Still, notwithstanding the *dicta* above mentioned, the actual point does not appear to have been ever determined, and it appears, to say the least of it, to be exceedingly doubtful, if the question should again arise, whether the concurrent lease would be supported. Yet, however doubtful this point may be, it appears that if the lessor were to grant a second lease to the former lessee, in such case the acceptance of the second lease would operate as a surrender of the first, and then the second would take effect as a lease in possession, and not as one concurrent with the pre-existing term; and if the old lease should be surrendered, there can be no doubt but that a fresh lease might then be granted to take effect in possession.

*What will be embraced under the terms usually letten.*

In order to restrain a tenant for life from leasing the mansion-house and grounds usually occupied by the proprietors of the estates, it is a common practice, both in wills and marriage settlements, to restrict the power of leasing to such lands as have been usually demised or letten, upon which a question frequently arises as to what is to be construed as the true and literal meaning of those terms. It seems, however, that they will comprehend every species of demise, whether it be at will, from year to year, or for years or lives, or whether it has been

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granted by parol or by deed, by copy of court-roll, covenant to stand seised, or by any other mode of assurance: (Co. Litt. 44, b; *Baugh* v. *Haynes*, Cro. Jac. 76; *Right* v. *Thomas*, 1 Black. 446; S. C. 3 Bur. 1441.) Lands which have been demised twice have been considered as lands usually let (1 Roll. Abr. 261, pl. 11, 12; Vaugh. 33), but not those which have been only once demised: (4 Roll. Abr. 262, pl. 13.) And even where lands have been demised many years ago, but have not been recently let, as within the space of the last twenty years or upwards, they will not be considered as coming under the description of lands usually demised: (*Tristram* v. *Baltinglass* (*Lady*), Vaugh. 31; 2 Freem. 23.) In investigating titles of leases, where the title depends upon a question of this kind, it will be necessary to ascertain by old leases, or other satisfactory evidence, that the lands have been usually demised previously to the granting of the lease; for unless this can be shown, the title will be clearly unmarketable.

What will be considered as the best rent.

What is to be considered as the best rent, within the meaning of that term in a leasing power, is often a perplexing and yet most important question, for upon this the lease must often be supported or fall to the ground: (*Wright* v. *Smith*, 5 Esp. N. P. C. 203.) The proper construction, however, seems to be, that where the power is so restricted, it means the best rack-rent that can reasonably be obtained by a landlord, at the same time taking into consideration all the requisites of a good tenant who will manage the estate in a husbandlike manner: (*Doe dem. Lawton* v. *Radcliffe*, 10 East, 278; *Queensbury Leases case*, 5 Dow. 343; 1 Bligh, 427; *Selsey* (*Lord*) v. *Rhodes*, 2 Sim. & Stu. 41.) There is but one criterion which our courts always attend to as a leading test in discussing the question whether the best rent has

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been got or not, and that is, whether the man who makes the lease has got as much for others as he has for himself; for, if he has got more for himself than for others, it will afford decisive evidence against him: (Per Lord Eldon, 1 Bligh, 247.) If, therefore, a fine be taken upon granting the lease, it must, for the very reason just laid down, avoid the lease, because, however considerable the rent may be, it might have been greater if the fine had not been received, and which at any rate gives more to the party taking it than the rent, which is all that those coming after him will be entitled to receive. It has, however, been held that a covenant by the tenant to repair and to improve, or expend money for that purpose, though it may have the effect of lessening the actual amount of rent, still, as the property will receive a corresponding advantage, it will not invalidate the lease: (*Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; *Doe dem. Bettison*, 12 East, 305; *Coxe* v. *Davy*, 13 *ib.* 118.)

Time at which rent should be made payable.

With respect to the time at which the reserved rent should be made payable, it seems that where the power requires the rent to be made payable yearly, this will not restrict the lessor from making it payable half-yearly, or quarterly: (*Campbell* v. *Leach*, Ambl. 740; *Doe* v. *Wilson*, 5 B. & Ald. 363.) But the rent cannot be made payable after the appointed day.

Provisoes for re-entry.

In leasing powers it is usual to direct that the leases shall contain a covenant on the part of the lessee for payment of the rent, and also a proviso for re-entry in case of his default in so doing within a stipulated number of days after it shall have become payable. In certain instances, however, the clause of re-entry has been stated generally, upon which a question has been raised as to whether the proviso for re-entry in the lease should not be made immediate upon nonpayment of the rent at the appointed days of payment,

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and whether, if the time be extended to the usual period of twenty-one days, it would not invalidate the lease on account of its not having pursued the terms of the power. But whatever doubts may have once existed, it seems at last to be settled that a reasonable time may be inserted without infringing upon the requisitions of the power, and although the Court of Exchequer not long since held that where a power required a proviso for re-entry on nonpayment of the rent generally, the power was not well pursued by a proviso for re-entry, if the rent was in arrear for fifteen days (*Doe dem. Jersey* v. *Smith*, 2 Bro. & Bing. 473), the House of Lords reversed the decision, and held that the power was well executed: (2 Bligh, 290; see also *Doe* v. *Wilson*, 5 B. & Ald. 363.)

As to clause in leases against committing waste.

It is also usual to insert in leasing powers that the lessee shall not be made dispunishable for waste. Under this clause a lessor cannot empower the lessee to work unopened mines, but he may authorize him to work those already open, and in due course of working. Neither will it authorize the lessor to permit the lessee to pull down buildings, or in fact to do any of those acts which the law considers as waste, and which acts, in themselves apparently trivial, may sometimes constitute waste, for even destroying a border of box appears to have been so considered: (*Empson* v. *Soden*, 4 B. & Ad. 655; 1 Nev. & Man. 720.) In the case of a power to grant building leases, a greater degree of latitude will be allowed, and therefore, although in other leases a lessee, liable to impeachment of waste, would not be authorized to pull down buildings, yet in a building lease the main object of the power could not be carried into effect, unless the lessee could pull down the old buildings to make way for the new ones: (*Jones* v. *Verney*, Willes, 169.)

Direction that lessee

Another common stipulation annexed to a

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power of leasing is that the lessee shall execute a counterpart, and where this occurs, the validity of the lease itself will depend upon this condition being complied with. This can usually be shown by a memorandum indorsed on the lease, which, if signed by the lessor, will afford sufficient evidence of that fact. But in case this has not been done, the counterpart itself must be produced,

shall execute counterpart.

Where the terms of a power are duly complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties: (*Wilson* v. *Sewell*, 1 W. Black. 617, 624; *Taylor* v. *Horde*, 1 Burr. 60.)

Lessor may take beneficially under leasing power.

There are certain cases in which a court of equity will relieve a defective execution of a power of leasing, where the terms of the power have not, through some inadvertence, been complied with. Hence, under a power to grant leases in possession, equity will relieve where a former lease is abandoned, although not actually surrendered; as it also will where there is merely a defect in the mode of execution, as where the instrument is only attested by two witnesses, the power requiring three, or where it is only under the hand when it ought to be under the hand and seal of the party; or where the donee of the power has contracted to grant a lease, but died before completing it (*Shannon* v. *Bradstreet*, 1 Sel. & Lef. 52; *Doe* v. *Weller*, 7 T. R. 478); because in none of these cases is there any fraud on the remainder-man, but merely an oversight of some prescribed formality. But where the interests of the remainder-man are in anywise prejudiced, as where the power is to grant leases in possession, and the donee grants reversionary leases; or where the power is to be restricted to such premises as have been usually demised, and the lease comprises lands

Equitable relief where power has been badly executed.

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that have not been so demised, or where the best rent is to be reserved, and this is not done, or where the power directs that the leases shall contain a covenant for the payment of rent, with a clause of re-entry in default thereof; or that the lessee shall not be made dispunishable for waste, and that he shall execute a counterpart, and all, any, or either of these clauses are omitted in the lease, such acts or omissions will be viewed as a fraud on the remainder-man, and such an invasion of his rights and interests as to repel all claim to equitable interference in aid of the defective execution of the power: (*Temple* v. *Baltinglass*, Finch, 275; *Doe dem. Ellis* v. *Sandham*, 1 T. R. 705.) And where a lease is void under a power, no subsequent acceptance of rent can make it good or render that valid which was actually void *ab initio:* (*Jones* v. *Varney*, Willes, 169; *Doe* v. *Watts*, 7 T. R. 82.)

Operation of stat. 12 & 13 Vict. c. 26, upon defective leases.

Some important alterations in the law with respect to defective leases, have been effected by the recent stat. 12 & 13 Vict. c. 26, which, after reciting that, through mistakes or inadvertence on the part of persons granting leases, and through ignorance, on the part of lessees, of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons, by reason of the non-observance or omission of some condition or restriction, or by reason of some deviation from the terms of such powers; and that leases granted in the intended exercise of such power are sometimes invalid as against the successors in estate of the persons granting the same, by reason that, at the time of granting the same, the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might

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have granted the same in the lawful exercise of such power; and that it was expedient that provision should be made for granting relief in the cases aforesaid, in the manner hereinafter mentioned, enacts, that in construing this act words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number, and words importing males shall extend to females, and the word "person" shall include corporations aggregate or sole, unless in any of the cases aforesaid there be something in the context repugnant to such construction.

Leases invalid owing to deviation from terms of the power to be deemed contracts in equity for such leases as might have been granted under the power: (s. 2.)

That where in the intended exercise of any such power of leasing as aforesaid, whether derived under an act of Parliament, or any instrument lawfully creating such power, a lease has been, or shall hereafter be granted, that is, by reason of the nonobservance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid, as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person, who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same had been made *bonâ fide*, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his executors, administrators or assigns (as the case may require) of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power: and all persons who would have been bound by a lease lawfully granted under such power, shall be

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bound in equity by such contract; but with a proviso, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled, by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation: (sect. 2.)

Proviso where grantor or reversioner is willing to confirm: (s. 2.)

That the acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease: (sect. 3.)

Acceptance of rent to be deemed a confirmation: (s. 3.)

That where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of the persons in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then, and in every such case, such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time; and all the provisions herein contained shall apply to every such lease: (sect. 4.)

Leases invalid at the time of granting thereof may become valid if the grantor continue in the ownership until the time when he might lawfully grant such a lease: (s. 4.)

That when a valid power of leasing is vested in, or may be exercised by a person granting a lease, and such lease (by the determination of the estate or interest of such person, or otherwise) cannot have effect or continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease: (sect. 5.)

What shall be deemed an intended exercise of a power: (s. 5.)

It is, however, provided that nothing in this act shall extend to take away any right of action, or other right or remedy to which, but for the

Saving the rights of lessees under covenants for title and

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for quiet enjoyment, and the lessor's right of re-entry for breach of covenant.

passing of this act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment, contained in such lease on the part of the person granting the same, or to prejudice or take away any right of entry or remedy, or other right or remedy to which, but for the passing of this act, the person granting such lease, his heirs, executors, administrators or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease would or might have been entitled to for or by reason of any breach of the covenants, conditions or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators or assigns to be observed and performed.

Act not to extend to certain leases.

It is also further provided that this act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease where, before the passing of this act, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease, and shall not affect or prejudice any action or suit already commenced and now pending in any court of law or equity, but every such action and suit may be proceeded with, and such relief had therein, as if this act had not passed.

Pending suits not to be prejudiced.

Mortgagee and mortgagor.

A mortgagee, unless in pursuance of a leasing power conferred upon him, cannot make a lease so as to be binding on the equity of redemption: (*Hungerford* v. *Clay*, 9 Mod. 1.) Indeed, if it were otherwise, it would be in the power of a mortgagee to debar the mortgagor of his benefit

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of redemption, by granting long leases upon fines; added to which, the mortgagor, on paying off the mortgage, would have no legal remedy for the recovery of the rent accrued due before the reconveyance to him; for, until then, he is neither party to the lease nor to the estate (*Keech* v. *Hall*, Doug. 22); and thus it is that, where a defendant has not obtained possession under the plaintiff, the latter can only recover rent from the time he has the legal estate in him, although he may have had the equitable long before: (*Cobb* v. *Carpenter*, 3 Camp. N. P. C. 13.) Neither can a mortgagor grant a lease that will be binding on the mortgagee; for all leases or other interests in land created by the mortgagor subsequently to the mortgage are absolutely void as against the mortgagee, who may treat the tenants under such leases, or persons claiming such interests, as trespassers, disseisors, and wrongdoers: (*Keech* v. *Hall*, Doug. 21.) But such leases will nevertheless be conclusive as against the mortgagor himself, who granted them, and will be binding on his equity of redemption: (2 Com. Dig. 107.)

### 2. *Capacity of Lessee to receive.*

All persons capable of becoming purchasers of real estate may hold leasehold property.

Aliens.

All persons capable of becoming purchasers of real estates are capable of holding leasehold property; a subject which has already been fully treated of in a preceding part of the present work (see *ante*, p. 229, *et seq.*), and to which I must beg to refer my readers. An alien friend, though incapable of holding landed property of any description in this country, may nevertheless hold a house for the purpose of trade and merchandise; and, from the remark in Blackstone (vol. 2, p. 93), it might also be inferred that he may hold a lease for that purpose. By the statute 32 Hen. 8, c. 16, s. 13, all leases of any dwelling-house or shop within this realm made

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to aliens are declared void (*Jevons* v. *Harridge*, 1 Saund. Rep. 56; *Lapierre* v. *M'Intosh*, 1 Per. & Dav. 629.) For the convenience of trade, however, an alien was permitted to hire a house for that purpose, and to occupy it at will (*Pilkington* v. *Peach*, 2 Show. 135), and a possession under this permissive occupation, if of a tenement of 10*l.* a year, has been held to confer an interest which enables him to gain a settlement by the provision of the legislature: (*Rex* v. *Eastbourne*, 4 East, 107; Woodf. Land. and Tenant, 38, 4th edit.) It has also been decided, that the statute, 32 Hen. 8, c. 16, did not extend to an assignment of a lease to an alien; for if it were otherwise, the lessor, without any fault of his own, would lose his remedy against the assignee: (*Wootton* v. *Steffenoni*, 12 Mees. & Wels. 129.)

Operation of stat. 7 & 8 Vict. c. 66, with respect to leases granted to aliens.

And now by the recent enactment, 7 & 8 Vict. c. 66, and which received the royal assent on the 16th of August, 1844, it is provided (sect. 5) that every alien then residing in any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements for the purpose of residence or of occupation, by him or her, or his or her servants, for the purpose of any business, trade, or manufacture, for any term of years, not exceeding twenty-one years, as fully, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of Parliament, as if he were a natural born subject of the United Kingdom. But alien enemies cannot hold leases either for the purpose of commerce or habitation: (Co. Litt. 26; *Calvin's case*, 7 Co. 17, a; Wing. Max. 10; 1 Black. Com. 372; *Anon.* Ow. 45.)

Whether an alien husband can

Under the act of 7 & 8 Vict. c. 66, an alien husband may take in right of his wife for resi-

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dence, occupation, or business, a term not exceeding twenty-one years; but whether a term generally, of which a woman is possessed, will, on her marriage with an alien, pass to her husband, does not appear to be yet settled: (*Theobald* v. *Duffoy*, 9 Mod. 101, 104; and see 1 Platt Leases, 533.)

take a lease in right of his wife.

Outlaws.

Outlaws may be lessees (*Knowles* v. *Powell*, Mos. 237; S. C. Ow. 116; Shep. Touch. 235), but their leases for chattel interests as forfeited to the crown, whether the outlawry be incurred in a civil or a criminal case (9 Hen. 6, c. 21; *Paine* v. *Teap*, 1 Salk. 109; *Reed* v. *Ward*, 1 Lev. 8; S. C. 1 Sid. 150; 1 Keb. 66, 548; *Britton* v. *Cole*, 1 Salk. 395; Rol. Ab. Utlagare, B. pl. 1, 2; Com. Dig. Utlagary, D. 2); but their freehold leases are not forfeited by an outlawry in a civil action (2 Roll. Abr. 807, 430; Com. Dig. Utlagary, D. 3), unless the immediate reversion should happen to be in the crown, in which case the lease would become merged; but, the outlaw, in case the outlawry was reversed, would be entitled to have his term restored, notwithstanding it may have been sold during his outlawry: (*Knowles* v. *Powell*; Mos. 237; *Eyre* v. *Woodfine*, Cro. Eliz. 278; S. C. 1 Anders. 277; T. Jones, 101; *Peyton* v. *Aycliffe*, 2 Vern. 312; Com. Dig. Utlagary, C. 5; *President and Scholars of St. John's College, Oxford*, v. *Murcott*, 7 Tr. 259, 264.) And if the outlaw, pending the outlawry, assign his term to another, the assignee may, after the reversal, maintain an action for the profits accruing in the interval between the assignment and the reversal: (*Ognell's case*, Cro. Eliz. 270; 1 Platt Leases, 535.)

Leases which outlaws take in their representative character as executors, &c., are not forfeited by their outlawry.

Leases which an outlaw takes in his representative character as an executor are not forfeited on his outlawry.

Attainted persons.

Persons attainted of treason or felony may be lessees; but their leases are forfeitable to the

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crown upon office found: (Shep. Touch. 235; Co. Litt. 26.)

Persons of unsound mind are, as we have already noticed, incapable of making any effectual disposition of their property (see *ante*, p. 15, *et seq.*); but this does not preclude them from taking leases for their own benefit: (Co. Litt. 26.) And by the statute 11 Geo. 4 & 1 Will. 4, c. 65, it is enacted, that where any person being lunatic (which term extends (sect. 2) to any idiot or person of unsound mind, or incapable of managing his affairs), shall become entitled to any lease, it shall be lawful for his committee, by the direction of the Lord Chancellor, to surrender such new lease, and take, in the name and for the benefit of the lunatic, a new lease for the term originally granted by the surrendered lease.

Persons of unsound mind.

A married woman is capable of taking a lease, nor is her husband's consent necessary to its vesting in her, and the estate will remain vested until divested by his dissent: (*Swain* v. *Holman*, Hob. 204; Co. Litt. 3, a.) But it will nevertheless be in her power to avoid the estate after her husband's death: (Co. Litt. 3, a; 1 Platt Leases, 531.)

Feme covert.

Where a married woman is entitled to a renewal, she, or any person on her behalf, by the direction of the Court of Chancery in England, and of the courts of equity of the counties palatine of Chester, Lancaster and Durham, as to land within their respective jurisdictions, may surrender the subsisting lease for the purpose of obtaining such renewal: (11 Geo. 4 & 1 Will. 4, c. 65, s. 121.)

Married woman enabled to surrender subsisting leases for the purpose of renewal.

With respect to leases granted to an infant, it appears that a lease, unless obviously prejudicial to their interests, will not be void (*Kirton* v. *Elliott*, *sup.*; *Baylis* v. *Dineley*, 3 Mau. & Selw. 477, 481; see also *Lloyd* v. *Gregory*, Cro. Car. 502; S. C. Sir W. Jones, 405); but may

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be voidable or not at his election on attaining his majority: (*Evelyn* v. *Chichester*, 3 Bur. 1719); *Holmes* v. *Blogg*, 8 Taunt. 35; S. C. 1 Roll. 731.) But if he elect to annul the lease, he cannot recover the consideration paid for it, though subsequent events may effect a complete failure of the object for which such consideration was given: (*Holmes* v. *Blogg*, *sup.*) In order also to escape from liability to the rent, he must express his dissent within a reasonable time, and it is apprehended, before the day of payment: (*Kirton* v. *Elliott*, *sup.*) But if the lessor were to treat the lease as avoided, that, it seems, would dispense with a formal notice of disaffirmance: (*Holmes* v. *Blogg*, *sup.*) Nor will a lease, although confirmed by an infant on attaining his majority, be binding upon him so as to render him liable to rent accrued due during his infancy, unless such lease be under seal. The statutes 9 Geo. 4, c. 14, s. 5, and 8 & 9 Vict. c. 106, s. 3, provide that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age.

Infants empowered to surrender leases to obtain renewals.

By statute 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, infants are empowered to surrender subsisting leases for the purpose of obtaining renewals.

### 3. *That the Lease is a Valid Lease.*

Essentials to the validity of the lease.

Previously to the Statute of Frauds (29 Car. 2, c. 3), a lease might have been made by parol for any number of years (Shep. Touch. 267); but by that statute all leases, as we have already seen (*ante*, p. 68), must be in writing, and signed by the parties themselves, or their agents, duly authorized, otherwise they will only operate as estates at will, excepting leases not exceeding three years from the making: (sects. 1, 2, 3.)

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Criterion for distinguishing actual leases from mere agreements.

But, even in the case of written instruments, questions have often arisen as to whether they are actual leases, or mere agreements to grant a lease at some future period. The best criterion for determining a point of this kind is the intent of the parties, to be collected from the language of the instrument, in which, if there are sufficient expressions to denote that its object and design is that one party shall divest himself of the possession, and the other come into it for a certain specified time, such expressions, whether they run in the form of a *licence*, *covenant* or *agreement*, are of themselves sufficient, and will in construction of law be as effectual for creating a lease as if the most pertinent form of words had been employed for that purpose; whilst, on the other hand, where the most technical form of words whereby to describe and pass a present lease for years are made use of, yet if, taking the whole instrument together, there appears to be no such intent, but it is only preparatory to, and relative to, a future lease to be thereafter made, the law will rather do violence to the words, than break through the manifest intent of the parties.

Leaning of the courts is to construe instruments rather as leases than agreements.

The leaning of the courts has generally been to construe instruments rather as leases than agreements, where the terms have been such as possibly to admit of that construction. Thus, previously to the Statute of Frauds (29 Car. 2, c. 3), it was held, that if a man said, "I will that you shall have a lease for twenty-one years, paying 10*s.* yearly rent: make a lease in writing, and I will seal it," this was a perfect lease: (*Anon.* Moore, 38; cited in *Maldon's case*, Cro. Eliz. 33.) So where, by articles indented and under seal, it was covenanted between the parties that J. H. "doth let" certain lands for a certain term, to begin from the Term of St. Michael next following, provided that the defendant paid a certain rent; and also the same parties covenanted

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that a lease should be made and sealed upon the feast of All Saints; it was held that this was a good present demise, and what followed was merely for further assurance (*Harrington* v. *Wise*, Cro. Eliz. 486; Noy. 57; Moore, 456); a doctrine which has been confirmed by a vast number of more recent decisions: (*Drake* v. *Munday*, Cro. Car. 207; *Evans* v. *Thomas*, Cro. Jac. 172; *Lady Montague's case*, *ib.* 301; *Richards* v. *Seely*, 2 Mod. 79; *Barry* v. *Nugent*, cited 5 T. R. 165; *Baxter* v. *Abrahall*, 2 W. Blacks. 973; *Right dem. Green* v. *Proctor*, 4 Burr. 2208; *Poole* v. *Bentley*, 12 East, 286; S. C. 2 Camp. N. P. C. 286; *Doe dem. Colcombe* v. *Fidler*, Peake, Add. Cas. 33; *Doe dem. Walker* v. *Groves*, 15 East, 244; *Wright* v. *Trevesant*, 3 Car. & Pay. 441; S. C. 1 Mood. & Malk. 231; *Pinero* v. *Judson*, 6 Bing. 206; S. C. 3 Moore & Pay. 497; *Stainforth* v. *Fox*, 7 Bing. 590; S. C. 5 Moore & Pay. 589; *Doe dem. Phillip* v. *Benjamin*, Per. & Dav. 440; *Doe dem. Pierson* v. *Ries*, 8 Bing. 178; S. C. 1 Moore & Scott, 159; *Alderman* v. *Neate*, 4 Mees. & Wels. 704; *Wilson* v. *Chisholm*, 4 Car. & Pay. 474; *Hancock* v. *Caffyn*, 1 Moore & Scott, 521; 8 Bing. 358; *Warman* v. *Faithfull*, 5 B. & Ad. 1042; S. C. 3 Nev. & Man. 137.

When an instrument will operate as an agreement only.

But if, on the other hand, the intention is manifest that the instrument is not intended to operate as a lease, it will be treated as a mere agreement. As, for example, if the instrument were to contain an express proviso that it shall not operate as a lease, or actual demise, it will be held to be merely an agreement, notwithstanding it may contain words of present demise, with a stipulation for re-entry, on breach of the covenants: (*Perring* v. *Brook*, 7 Car. & Pay. 360; S. C. 1 Mood. & Rob. 510.) And words also that denote that the lease is not to commence until some future time; as, where the instru-

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ment, after stating that A. shall hold and enjoy, *engages to give him a lease from Whitsuntide next* (*Roe dem. Jackson* v. *Ashburner*, 5 T. R. 163; see also *Goodtitle dem. Estwick* v. *Way*, 1 T. R. 735); or that some future act is to be done before the relation of landlord and tenant is to commence; as, where the lessor was to acquire *an additional piece of ground, without which the lease was not to be granted*, these special stipulations will afford a proof that the instrument was intended merely as an agreement, and not as an actual lease: (*ib.*) So where a person agreed to let certain premises from a day past at a specific rent, containing the terms of the tenancy, and stipulating that the lease should be granted immediately *after the supposed lessor should obtain his lease of the same premises, under an agreement previously entered into for that purpose*, it was held that this was no more than an agreement for a lease; for here a future act was clearly necessary to create the relation of landlord and tenant, which could not arise whilst the lessor had no demising power: (*Hayward* v. *Haswell*, 1 Nev. & Per. 411; S. C. 6 Ad. & Ell. 265.) Upon the same principle also, where a landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting, upon different terms from those upon which the premises were then holden, *the amount of rent to be settled by valuation, and the tenant to find sureties;* the amount *not* having been so settled, nor any sureties given, it was held that the instrument, though it contained words of present demise, did not operate as a lease nor alter the terms of the existing tenancy: (*John* v. *Jenkins*, 1 Cromp. & Mees. 227.) And an instrument reciting that A., in case he should be entitled to certain copyhold premises *on the death of B.*, would immediately demise the same to C., declaring that he did thereby agree to demise the same, with a subse-

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quent covenant to procure a licence to let from the lord, was held to operate as an agreement, and not as an absolute demise. There were, it seems, two grounds for this determination. First, not only was A. to acquire the premises, but he was also to obtain the licence of the lord, and thus a future event was to take place, and a future act to be performed, before the lease was to be granted. And, secondly, to construe it as a present lease would be to cause a forfeiture, which would have been contrary to the intent of the parties, who had cautiously guarded against it by a covenant that a licence to lease should first be obtained of the lord: (*Doe dem. Coore* v. *Clare*, 2 T. R. 739.)

What weight a stamp will give to the construction of an instrument.

It appears that there was even another ground upon which the above case was determined; viz., that the instrument had an agreement stamp attached to it, and not one adapted for an actual lease. In order, however, that a stamp may have any weight upon the construction of an instrument, it must have been affixed to it at the time of signature, or at any rate before a doubt, question or dispute had arisen upon the subject; for if placed there afterwards, it will only serve to show it to be such as the party producing it had been advised would be the best to have adopted after such doubt, question or dispute had arisen: (see Com. Dig., Land. and Tenant, 74, a, x.) It has long been settled that any collateral circumstances occurring *subsequently* to the making of the instrument will not be permitted to have any weight in guiding its construction. The only thing to be considered is the intention of the parties *at the time of entering into it*, as therein expressed: (*Morgan* v. *Bissel*, 3 Taunt. 71.)

Recent enactments respecting instruments of this kind.

With respect to future instruments, the recent statute, 8 & 9 Vict. c. 106, s. 3, enacts, that a lease required by law in writing of any tene-

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ments or hereditaments made after the 1st day of October, 1845, shall be void at law, unless made by deed; so that, after the period mentioned in the act, no instrument, unless under seal, however worded, can be construed as a lease; still this will not prevent an instrument under seal from being construed as an agreement, where, from the terms in which it is expressed, the parties evidently intended it should have that operation.

*Certainty of the term is essential to its validity.*

It is essential to the validity of a term of years that it should have a certain beginning and a certain end (Co. Litt. 45 b; Ins. 486; Bac. Abr. tit. Lease, L.; 4 Cru. 62), or, in other words, the continuance of the term must be measured by years, months, weeks, days, or some other period equally reducible to a certainty with years, months, weeks, days, &c., so that the extreme bound of duration of interest may be ascertained at latest immediately after the term commences, otherwise it will not be good: (Shep. Touch. 267; 2 Blac. Com. 144; 2 Prest. Conv. 161.)

*As to conditions to defeat term.*

Still, notwithstanding the term must have a certain beginning and a certain end, this does not exclude conditions to defeat or collateral determinations to put an end to the term in the meantime, before it has filled the full measure of its continuance (2 Prest. Conv. 162), neither is it repugnant to the nature of a lease that it should in certain cases cease and again revive; as in the instance of a tenant in tail making a lease for years, in conformity to the statute enabling tenants in tail to make leases (32 Hen. 8, c. 28), and dying without issue leaving his wife *enciente* with a son, when the lease, although it will cease, as being void against the remainder-man, will yet revive as soon as the son is born. And in like manner if a person whose wife is dowable make a lease, and die, although his wife surviving him may avoid the lease, yet after her death so much of the lease

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as is then unexpired will again be in force: (*Peto* v. *Pemberton*, Cro. Car. 101; Co. Litt. 46; Shep. Touch. 275.)

Date.

A lease to commence from the date may be taken inclusive or exclusive, as will best effect the intention of the parties: (*Freeman* v. *West*, 2 Wils. 165; *Pugh* v. *Duke of Leeds*, Cow. 714; *Ackland* v. *Lutley*, 1 Per. & Dav. 636.) Hence where there is a power to grant leases in possession, or the lease conveys a freehold interest, as for life or lives, it will be construed inclusive, because in the first instance the power would otherwise be badly executed, and in the second it would be altogether inoperative as an estate of freehold to commence *in futuro*, unless this construction were to be adopted: (*Hatter* v. *Ash*, 1 Lord Raym. 84; *Bellasis* v. *Hester*, *ib.* 280; *Rex* v. *Adderley*, Doug. 465.) When the time of commencement is specified, or when the term is expressed to commence from the making, or from henceforth, or from no date at all, or from an impossible date, as the 30th February or 31st November for instance (Co. Litt. 46, b; *Arnitt* v. *Bream*, 2 Lord Raym. 1082), it shall then take effect from the time of the delivery of the deed (*Llewellyn* v. *Williams*, Cro. Jac. 258); but where the limitation is altogether uncertain, as a lease from the 10th day of October, to hold from the 20th day of November, without saying what November is meant, this uncertainty will avoid the lease; because the limitation forms part of the agreement, and the court cannot determine it, for want of knowing what the terms of the contract really are: (Bac. Abr. Leases, L. 1; *Anon.* 1 Mod. 180; 4 Cru. 63.) And if a deed have a sensible date, the word "date" occurring in other parts of the deed means the day of the date and not of the delivery: (*Oshley* v. *Hicks*, Cro. Jac. 263; *Hall* v. *Cazenove*, 4

East, 477; *Styles* v. *Wardle*, 4 B. & C. 908; see also Woodf. Land. and Ten. 72.)

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When the term itself is certain, the time at which it is limited to take effect in possession may be uncertain.

Where, however, the term itself is certain, it will not fail, because the time at which it is limited to take effect in possession may be uncertain; as in the case put by Lord Kenyon (3 T. R. 463), of a lease granted for twenty-one years, to commence from the death of three lives then in being; for though there appears no certainty of the actual time of commencement of the lease, yet, if by reference to a certainty, it may be made certain, it is sufficient (Dy. 124; 6 Rep. 34, b; 4 Cru. 63; Shep. Touch. 272); and here, although it was uncertain when the lease would commence, yet, when the lives die, which is sure some time or other to happen, the uncertainty is removed. Upon the same principle also, if A. grant a lease to B. for so many years as J. S. shall name, notwithstanding this was uncertain at the beginning, yet, when J. S. has named the years, this will reduce the term to a certainty. This nomination must, however, be made in the lifetime of the parties, because it is essential to every lease that there should be a lessor and a lessee; and thus it is that a lease for so many years as the executors of the lessor should name would not be good: (Bac. Abr. Leases, L. 2; see also Woodf. Land. and Ten. 73.)

Leases not perfected until entry, when.

Under a common-law lease, the term is not perfected without an actual entry by the lessee on the demised premises. The interest he acquires upon the execution of the lease is called an *interesse termini*, giving him only a right of entry on the tenement, which, when he has by entry reduced into possession, the estate is then, but not before, vested in him, and until then he could not grant an under-lease of the premises (1 Ins. 46); still an entry for this purpose may be made as well by the represen-

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tatives of the lessee after his death as by the lessee himself during his lifetime: (Bac Abr. M. 1; 1 Cru. 329.) These remarks are, however, only applicable to a common-law lease; for, if a term of years be created by way of bargain and sale under the Statute of Uses (27 Hen. 7, c. 10), and which does not require to be enrolled (*Heyward's case*, 2 Co. 35; *Fox's case*, Shep. Touch. 93), that statute would execute the possession in the lessee in the same manner as his entry would have done in the case of a lease at common law; in either of which cases an under-lease granted by him afterwards would be good: (*Lutwich* v. *Mitton*, Cro. Jac. 604; *Iseham* v. *Morrice*, Cro. Car. 110; *Saffyn's case*, 5 Rep. 125; *Barker* v. *Keate*, 2 Mod. 252; *Geary* v. *Bearcroft*, Carth. 66.) And notwithstanding it has been considered that no use could be raised on a bargain and sale without a pecuniary consideration, it has been long settled that not only will a mere nominal consideration, as five shillings, for instance, be sufficient, but also that reservation of a mere nominal rent, as a peppercorn or a barleycorn, will be enough to raise a use of this kind (*Barker* v. *Keate*, 2 Mod. 252; 4 Cru. 126; *Shortridge* v. *Lamplugh*, 2 Lord Raym. 798; S. C. Salk. 678; 7 Mod. 71); and where the consideration is sufficient, any words, as for example, "give, grant, confirm, agree, or covenant," for money, will enable the instrument to operate as a bargain and sale: (*Grey* v. *Edwards*, 4 Leon. 110; Cornish on Purchase Deeds, 13.) Still, for all this, the words "bargain and sell" are the most apt and technical terms, and it is the more accurate plan, where a term is intended to be created by way of bargain and sale, to insert no other operative words. It will be proper also to remark here, that although a lessee under a common-law lease cannot grant an under-lease until he reduces

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his *interesse termini* into possession, by entry, yet in those cases where the term is only granted to commence *in futuro*, he may assign it over before entry; because he cannot then reduce his interest into possession by an immediate entry, as that would be a disseisin: (Bac. Abr. Leases M.; 4 Cru. 241.)

### 4. *As to Reserved Rents.*

*It should be ascertained that the reserved rent is correctly stated.*

It will, as I have before remarked, be requisite to ascertain that the reserved rent does not exceed the specified amount. This may easily be ascertained by an inspection of the lease. At the same time it will be advisable to see whether or not the rent is correctly reserved; for it has sometimes happened that the *reddendum* in a lease has been so inaccurately framed as to become altogether inoperative, as where it is made payable to strangers (Litt. s. 346; *Cole* v. *Swey*, Latch. 276); and although rent may be reserved to the heirs, &c., without being reserved to the ancestor (2 Prest. Conv. 184; Bac. Abr. Rent; Co. Litt. 213, b. and note); yet it will only be so when named by that appellation. Hence, where a father and his son and heir apparent demised lands for years, to begin after the death of the father, rendering rent to the son, such reservation was holden to be void; for the reservation to the son being by his proper name, and not to him as heir, was the same as if it had been to a stranger; and, though the son did prove heir, it bettered not the case by that event: (*Oates* v. *Frith*, Hob. 130; *Southampton* v. *Brown*, 6 B. & C. 718.) So if the reservation be simply to the lessor, without naming his representatives, the rent will only continue during his lifetime (2 Wms. Saund. 367; Shep. Touch. 114); and the construction will be the same where the reservation is to the lessor

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or his heir, which will be good to the lessor for his life, and void as to his heir afterwards: (Co. Litt. 214, a.) Again, if a rent be reserved to a lessor and his assigns, it will determine by the lessor's death (1 Ins. 47, a; *Wootton* v. *Edwin*, 12 Rep. 36), as it also will if reserved to him and his executors, *without saying during the term*, where he has a freehold interest (*Saccheverell* v. *Frogate*, Ventr. 161; S. C. 2 Wms. Saund. 361; 2 Roll. Abr. 450); for the executors cannot have the rent, though they be named, because they are not the representatives of the lessor *quoad* the reversion to which the rent is annexed; and the heirs cannot have it, because they are not named: (*Saccheverell* v. *Frogate*, *suprà*.)

Under-lease.

In like manner, if an under-lease be made of a term of years, rendering rent to the lessor and his heirs, *without limiting it during the term*, it will determine by the lessor's death; for the heir cannot have it, because he cannot succeed to the reversion, which is only a chattel, and the executors cannot have it, as there are no words to carry it to them: (*Drake* v. *Munday*, Cro. Car. 207.) This is one of the reasons, therefore, why the rent ought generally to be reserved *during the term*, for then it will be incident to the reversion, and belong to the heir, executor or assignee who, for the time being, shall be the owner of such reversion, notwithstanding the omission of the words "to the heirs" in the case of freehold, and of "the personal representatives" in the case of chattel interests: (*Saccheverell* v. *Frogate*, *sup.*; *Bury* v. *Brown*, Latch. 99, 100; see also *Whitelocke's case*, 8 Rep. 71.) At the same time there is nothing to preclude a lessor, if he wishes it, from reserving a rent to commence from and after a given time, or a given event, or to cease before the end of the term; but whenever this is done, the render

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should be to the lessor and such of his representatives as the reversion will devolve upon at his decease: (2 Prest. Conv. 184.) Where, however, no reversion is left in the lessor, as in the instance of a tenant for three lives, to him and his heirs, assigning over his whole estate, reserving to himself, his executors, administrators and assigns a certain rent, it will go to his personal representatives and not to his heirs: (*Jenison* v. *Lexington*, 1 P. Wms. 555.)

Tenant in tail.

If a tenant in tail demise for years, rendering rent to himself and his heirs, the rent will go to the heir in tail, as being incident to the reversion, if the reversion shall descend upon him, though he may not answer the description of general heir of the lessor: (Hard. 89; 1 Ventr. 168; Com. Dig. Rent, B. 5.)

Party seised *ex parte materna*, in gavelkind and borough English.

If a person seised *ex parte materna*, or in any other special manner, makes a lease reserving rent to him and his heirs, the rent, as incidental to the reversion, will belong to the heir inheritable to the estate descending on him. And the like rule prevails in respect of the rent of lands in gavelkind and borough English: (2 Prest. Conv. 190.)

### 5. *As to the Covenants.*

Covenants express and implied.

Covenants in leases are express or implied: an express covenant being an agreement by deed between two or more for the performance or forbearance of certain acts (Selw. N. P. 445, 9th edit.); whereas an implied covenant arises by implication of law out of certain technical expressions contained in the deed, and the particular relation in which the parties stand to each other. Thus, on the part of the lessor, it has been held, that there is an implied covenant for quiet enjoyment, under the words "grant and demise" (*Nokes* v. *James*, Cro. Eliz. 674; *Deering* v.

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*Farrington*, 1 Mod. 113; *Style* v. *Hearing*, Cro. Jac. 73; *Holden* v. *Taylor*, Hob. 461; *Pincombe* v. *Rudge*, 1 Yelv. 139; *Coleman* v. *Sherwyn*, Carth. 67; S. C. Salk. 237; *Fraser* v. *Skey*, 2 Chitt. Rep. 646; *Iggulden* v. *May*, 9 Ves. 330); (of which the assignee may take the same advantage as the lessee himself); (*Spencer's case*, 5 Co. 17, a) as there also is on the part of the lessee, that he will cultivate the demised lands in a husbandlike manner (*Powley* v. *Walker*, 5 T. R. 373); sustain the fences: keep the premises generally in good and tenantable repair (*Cheetham* v. *Hampson*, 4 T. R. 318; *Whitfield* v. *Weedon*, 2 Chitt. Rep. 685; 1 Wms. Saund. 322, n.); and will not commit waste thereon: (Shep. Touch. 439.) But although a tenant is bound under an implied covenant to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay on the premises, he will not be bound to make substantial and lasting repairs, such as new roofing, or the like: (*Ferguson* v. ——, 2 Esp. N. P. C. 589.)

How an implied covenant may be restrained.

An implied covenant may also be restrained by a qualified or express covenant, in which case it will not be extended beyond the limits of such express covenant; for where there is an express covenant, another cannot be implied; consequently, where a lessor demised and granted a house for a term of years, and covenanted that the lessee should enjoy the house during the term, *without eviction* by the lessor, *or any claiming under him*, it was holden that the express covenant qualified the generality of the covenant raised by implication of law from the words "*demise and grant*," and so that it should not extend further than the first covenant: (*Noke's case*, 4 Co. 80, b; see also *Deering* v. *Farrington*, 1 Mod. 113; *Hayes* v. *Bickerstaff*,

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Vaugh. 126; *Brown* v. *Brown*, 1 Lev. 57; *Frontin* v. *Small*, 2 Lord Raym. 1418; *Browning* v. *Wright*, 2 Bos. & Pull. 13; *Chater* v. *Beckett*, 7 T. R. 201; *Merrill* v. *Frame*, 4 Taunt. 329; *Line* v. *Stephenson*, 4 Bing. N. C. 678.) It does not appear that the word "assign" would have raised an implied covenant: (*Burnett* v. *Lynch*, 5 B. & C. 609.) And now by the recent statute 8 & 9 Vict. c. 106, it is expressly enacted that the word "give," or the word "grant," in a deed executed after the 1st day of October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give," or the word "grant," may by force of any act of Parliament imply a covenant: (sect. 4.)

Distinction between express and implied covenants.

The distinction between implied covenants and express covenants is that the latter are taken more strictly against the covenanting party: (*Shubrick* v. *Salmond*, 3 Burr. 1639); consequently, although in an implied covenant the law will excuse him, where he is disabled from performing it, without any default on his part (*Paradine* v. *Jane*, Aleyn, 27; *Beale* v. *Thompson*, 3 Bos. & Pull. 420; *Atkinson* v. *Ritchie*, 10 East, 533); yet in the case of an express covenant, where a party by his own act imposes upon himself a duty or charge, he is bound to make it good notwithstanding inevitable accident; because he might have provided against it by his own covenant. Hence, if a lessee covenants to repair a house, which is afterwards burnt down or destroyed by lightning, tempest, the king's enemies, or other inevitable accident, he will be bound to repair it: (Dy. 33, a; *Walton* v. *Waterhouse*, 2 Wms. Saund. 240; S. C. 3 Keb. 40; *Earl of Chesterfield* v. *Duke of Bolton*, Com. 627.)

Where there is an express covenant for payment

And even where there is no covenant to repair, yet where there is an express covenant to pay the rent, the latter covenant will remain in force,

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of rent, covenantor will remain liable, although the premises are destroyed by fire.

and the lessee will remain liable to the rent, although the premises are destroyed by fire, and are not afterwards rebuilt by the lessor, after notice: (*Monck* v. *Cooper*, 2 Lord Raym. 1477; S. C. Str. 763; *Pindar* v. *Ainsley*, 1 T. R. 312, cited; *Belfour* v. *Weston*, 1 T. R. 310; *Weigall* v. *Waters*, 6 T. R. 488; *Hare* v. *Groves*, Anstr. 687.)

Covenantor cannot be relieved in equity.

Formerly, the Court of Chancery would have relieved in cases of the above description, and although the landlord would not have been compelled to rebuild, he would nevertheless have been restrained from proceeding at law for the recovery of his rent until he did so: (*Camden* v. *Morton*, cited Selw. N. P. 457; *Brown* v. *Quilter*, Amb. 619.) But it has been since decided that a tenant has no such equity; and in *Leeds* v. *Cheetham* (1 Sim. 146), the Lord Chancellor refused to compel a landlord to expend money received from an insurance office on account of the demised property which had been burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises were rebuilt: (see also *Hare* v. *Groves*, Anstr. 687 ; *Holtzapffell* v. *Baker*, 18 Ves. 117.)

Lessee remains liable to covenant running with the land, although he may have assigned his interest in the term.

In the case of an express covenant, also, which runs with the land, the lessee will remain liable during the continuance of his term, notwithstanding he may have assigned it to another person (*Rushden's case*, 1 Dy. 4; *Anon.* 2 Dy. 247, b. pl. 77; *Walker's case*, 3 Co. 22, a. b.; *Overton* v. *Lydall*, Cro. Eliz. 555; *Fisher* v. *Ameers*, 1 Brown. & Gold. 26; *Brett* v. *Cumberland*, Cro. Jac. 552; *Barnard* v. *Godscall*, *ib.* 309; *Varnis or Ventrice* v. *Goodcheap*, cited *ib.* 309; *Hassel's Executors*, Hetl. 46 ; *Iremonger* v. *Newsam*, Latch. 260; *Batchelsun* v. *Gage*, Cro. Car. 188; *Norton* v. *Ackland*, *ib.* 580; *Countess of Devon* v. *Collyer*, 1 Roll. Abr. 522, N. pl. 1; *Thursby*

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v. *Plant*, 1 Saund. 236; S. C. 1 Lev. 259; *Nurstie* v. *Hall*, 1 Ventr. 10; *Ashurst* v. *Mingay*, 2 Show. 133; *Parke* v. *Webb*, 3 Salk. 5; *Edwards* v. *Morgan*, 3 Lev. 333; *Hellier* v. *Casbard*, 1 Sid. 266; *Humble* v. *Glover*, Cro. Eliz. 328; *Arthur* v. *Vanderbank*, 7 Mod. 198; *Jodderell* v. *Cowell*, Ca. temp. Hard. 343; *Jenkins* v. *Hermitage*, Freem. 277; S. C. *sub. nom. Jenkins* v. *Armitage*, 3 Keb. 367; *Hornby* v. *Houlditch*, 1 T. R. 93, n.; *Mills* v. *Auriol*, 1 H. Blacks. 433; S. C. 4 T. R. 100; *Wilson* v. *Wigg*, 10 East, 313; *Buckland* v. *Hall*, 8 Ves. 95; *Staines* v. *Morris*, 1 Ves. & Bea. 11; *Burnett* v. *Lynch*, 5 B. & C. 589, 604; S. C. 8 Dow. & Ry. 368; *Manning* v. *Flight*, 3 Barn. & Adol. 211, 215; *Thomas* v. *Cook*, 2 Stark. N. P. C. 408, 410; see also 2 Platt Leases, 352); nor will the circumstances of the lessor's having accepted the assignee as his tenant vary the case: (*Barnard* v. *Godscall, sup.*; *Brett* v. *Cumberland, sup.*; *Ventrice* v. *Goodcheap, sup.* N. pl. 1; *Fisher* v. *Ameers, sup.*; *Thursby* v. *Plant, sup.*; *Boulton* v. *Cann*, Freem. 337; *Ashurst* v. *Mingay*, T. Jones, 144; *Edwards* v. *Morgan, sup.*; *Jodderell* v. *Cowell, sup.*; *Auriol* v. *Mills, sup.*) And the law is the same although he be outlawed (*Ramsay* v. *Macdonald*, Fost. Cr. L. 61; cited 15 East, 465), or his estate be wrested from him by the operation of a *fi. fa.*, or an *elegit* (*Auriol* v. *Mills, sup.*), or attainted for felony (*Trussel's case*, Cro. Eliz. 213; *Hastings* v. *Blake*, Noy. 1), or by an act of confiscation: (*Hornby* v. *Houlditch*, 1 T. R. 93, cited.) But in no case can the original lessor maintain this action against a mere under-lessee: (*Holford* v. *Hatch*, Doug. 183.)

*Personal representatives of lessee, when bound by his covenants.*

The executors or administrators of a lessee, *having assets*, may be bound by the covenants of their testator, or intestate, although they are not named therein: (*Quick* v. *Ludburrow*, 3 Bulstr. 30; Shep. Touch. 178.) Executors or adminis-

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trators may also be sued as assignees, they being in fact assignees in law of the interest of the term: (*Tilney* v. *Norris*, Salk. 309.) But where the covenants are merely of a personal nature, or such as must necessarily determine with the death of the party entering into them (*Hyde* v. *Windsor (Dean of)*, Cro. Eliz. 552), his personal representatives will not be bound, unless the words "during the term" be added to the covenant. Hence it has been said, that if a lessee for years covenants *for himself* to repair the houses demised, omitting other words, he is only bound to repair during his life, and his personal representatives consequently are not liable: (Shep. Touch. 178.) It is also said, that if a lessor covenants, *for himself only*, to discharge the lessee of the quit-rents out of the land, this covenant is only personally binding on the lessor: (*Ingery* v. *Hyde*, Dy. 124; Wms. Exors. 1229.) But if in either of these cases the words, "during the term," had been added, as on a covenant by a lessee *for himself* to repair the houses *during the term*, or a covenant by the lessor for himself to repair the houses during the term, it seems that this covenant would be binding on his personal representatives after his death: (Shep. Touch. 482; Wms. Exors. 1229.)

Covenant running with land binding on assignee although not named.

Whenever a covenant is annexed to the demised property, and so forming a covenant running with the land, it will be binding on the assignee, although he be not named: (*Spencer's case*, 5 Rep. 17, b.) Thus he will be bound by a covenant to pay rent and taxes (*Parker* v. *Webb*, 3 Salk. 5; *Porter* v. *Sweetman*, Sty. 406; *Stevenson* v. *Lambard*, 2 East, 575; *Vyvyan* v. *Arthur*, 1 B. & C. 410, 416; S. C. 1 Dow. & Ry. 670, 675), or to keep the demised premises in good and tenantable repair (*Dean and Chapter of Windsor's case*, 5 Rep. 24, a); to reside constantly on the demised premises (*Tatam* v. *Chaplin*, 2 H. Bl. 133); to farm the same in a

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husbandlike manner (*Cockson* v. *Cock*, Cro. Jac. 125; *Sail* v. *Kitchingham*, 10 Mod. 158; *Hughes* v. *Richman*, Cow. 125; *Bally* v. *Wells*, 3 Wils. 25; S. C., Wilm. 341, 352); to leave part of the land every year for pasture (——— v. *Davis*, referred to Woodf. Landlord and Tenant, 80; *Cockson* v. *Cock*, Cro. Jac. 125); to grind all the corn grown on the premises at the lessor's mill (*Vyvyan* v. *Arthur*, 1 B. & C. 410); or to insure the property against fire, *coupled with a provision for applying the insurance money in reinstating the premises*, in case of fire[1] (*Vernon* v. *Smith*, 5 B. & Ald. 1); all of which are covenants running with the land, into whose hands sover it may chance to come. Covenants of this kind will be equally binding on a mortgagee, where a term is assigned to him as a mortgage security, as any other assignee of the property: (*Westerdell* v. *Dale*, 7 T. R. 312; *Stone* v. *Evans*, cited 7 East, 341; *Williams* v. *Bosanquet*, 1 Bro. & Bing. 238; *Burton* v. *Barclay*, 7 Bing. 745.) As it will also on an assignee by operation of law, as a tenant by *elegit* of the term: (*Spencer's case*, 5 Rep. 17, b.)

*Collateral covenants not binding on assignee although he be named.*

But where, on the other hand, the covenant relates to a thing merely collateral to the property demised, as to pay any collateral sum to the lessor, or to a stranger, or to build a house on the lands of the lessor not included in the demise (*Mahoe* v. *Buckhurst*, Cro. Jac. 438), the assignee, although named, would not be bound by it: (*Mayor of Congleton* v. *Pattison*, 10 East, 130; *Easterby* v. *Sampson*, 1 Cro. & Jer. 118; *Flight* v. *Glossop*, 2 Bing. N. C. 131.)

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[1] In order, however, to make this covenant run with the land, it must be accompanied with a stipulation for applying the insurance money on the restoration of the premises: (2 Platt Leases, 403.)

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Assignee not responsible for breach of covenant previously to assignment.

Neither is an assignee responsible for any breach of covenant by the lessee previous to the assignment (*Grescot* v. *Green*, 1 Salk. 199; *Britain* v. *Vaux*, Lutw. 109; *Churchwardens of St. Saviour's* v. *Smith*, 3 Bur. 1271; S. C. 1 Black. 351; *Hawkins* v. *Shearman*, 13 Car. & Pay. 429), nor for any breach of covenant committed after he has assigned over the devised premises to another person (*Pitcher* v. *Tovey*, 1 Salk. 81; S. C. by name of *Tovey* v. *Pitcher*, 3 Lev. 295; *Chancellor* v. *Poole*, Doug. 764); and an assignment to a married woman (*Barnfather* v. *Jordan*, 2 Doug. 452), a beggar (*Walker's case*, 3 Co. 23, a; *Lereux* v. *Nash*, Str. 1221; *Fagg* v. *Dobie*, 1 You. & Coll. 96; *Nouaille* v. *Flight*, 7 Bea. 521), or a person about to leave the kingdom (*Taylor* v. *Shum*, 1 Bos. & Pull. 21), provided it be done before his departure, will be valid, and this notwithstanding the assignee never takes possession under it: (*Lereux* v. *Nash*, Str. 1221; *Taylor* v. *Shum*, 1 Bos. & Pull. 21; *Odell* v. *Wake*, 3 Camp. N. P. C. 394.) And such assignments will be valid in equity as well as at law, unless the assignment be colourable or fictitious, as where the assignor retains the possession, or receives the profits after the supposed assignment (*Philpot* v. *Hoare*, Ambl. 480; *Vailliant* v. *Dodemede*, 2 Atk. 546; *Onslow* v. *Come*, 2 Mad. 345; *Fagg* v. *Dobie*, 3 You. & Coll. 396), or the assignment is made to some fictitious party who has no actual existence: (*Taylor* v. *Shum*, *sup.*; and see 2 Platt Leases, 417.) But an assignee cannot, by assigning his term before action brought, defeat an action for a breach of covenant running with the land and incurred in his time, where the right of action is complete, and vested previously to such assignment: (*Pitcher* v. *Toovy*, 1 Salk. 81; *Harley* v. *King*, 2 Cr. M. & R. 18.)

Equity.

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What kind of covenants will run with the land.

Covenants that the vendor is seised in fee; that he has good right to convey; for quiet enjoyment (*Noke* v. *Awdrey*, Cro. Eliz. 375; *Lewis* v. *Campbell*, 3 Moore, 35, 51; 3 Barn. & Ald. 392), freedom from incumbrances, and for further assurance (*Middlemore* v. *Goodhall*, Cro. Car. 503; *Kingdon* v. *Nottle*, 4 M. & S. 53), are covenants running with the land; so is a covenant to renew a lease (*Spencer's case*, Moore, 159; *Istead* v. *Stoneley*, 1 Anders. 82; *Brookes* v. *Bulkeley*, 2 Ves. 498; *Sheburne* v. *Biddulph*, 1 Bro. C. C. 383; *Simpson* v. *Clayton*, 4 Bing. N. C. 758; *Vernon* v. *Smith*, 5 B. & Ad. 11), or to produce title deeds (*Barclay* v. *Raine*, 1 Sim. & Stu. 449), and as such binding on the reversion, and for breach of which the assignees or the lessee may maintain an action against him. With respect, however, to the covenants for the production of title deeds running with the land, they only do so for the benefit of purchasers, and not of vendors; in other words, purchasers from the covenantee will take advantage of them against the covenantors themselves, but the liability *will not extend to the covenantor's assignees.* The consequence is that a sale by the covenantor will manifestly tend to the prejudice of the covenantee, and his assigns, by defeating them of their power of obtaining a specific performance of the covenant. It is true, that the remedy of an action at law for a breach of covenant would remain, but damages would amount to a poor substitute for the advantages derivable from the production of the documents themselves: (see Platt on Covenants, 227.) A covenant by a lessor to build a new smelting-mill in lieu of an old one, in a lease of mines, has been considered as a covenant running with the land: (*Sampson* v. *Easterby*, 9 B. & C. 505; S. C. in error, under the name of *Easterby* v. *Sampson*, 6 Bing. 644; 1 Cr. & Jer. 105; 4 Moore & R. 601.) And so

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also has a covenant by a lessor to supply two houses with good water at a rate therein mentioned for each house: (*Jourdan* v. *Wilson*, 4 B. & Ald. 266.) But a covenant by a lessor to pay for all trees planted by the lessee does not run with the land: (*Grey* v. *Cuthbertson*, 2 Chit. Rep. 482; Selw. N. P. 498.) A covenant for payment of rent is also a covenant that runs with the land (*Isherwood* v. *Oldknow*, 3 M. & S. 382), as is also a covenant from a lessee of tithes for himself, and his assigns, not to let a particular person have any part of the tithes (*Bally* v. *Wells*, 3 Wils. 25); but a covenant to pay a rent-charge will not run with the land so as to enable an assignee of such rent-charge to sue upon it: (*Milnes* v. *Branch*, 5 Mau. & Selw. 411; *Doe dem. Cheere* v. *Smith*, 5 Taunt. 795; see also 12 M. & W. 129, *et seq.*) Neither is a covenant not to assign without licence a covenant that runs with the land: (*Doe dem. Cheere* v. *Smith*, 5 Taunt. 795.)

Covenant not to assign without licence.

This covenant, with a clause of re-entry in case of breach, is frequently introduced into leases for the purpose of securing a responsible tenant to the lessor; but though often inserted, it will not, strictly speaking, come under the description of a *common and usual* covenant. Thus, in *Henderson* v. *Hay*, where a bill was filed for a specific performance of an agreement by a landlord to grant a lease of a public-house containing the common and usual covenants, Lord Thurlow said, that though the covenant not to assign without licence might be a very usual one where a brewer let a vintner a public-house, that would not have made it a *common* covenant, and he held accordingly that the landlord was not entitled to have it inserted: (3 Bro. C. C. 632.) In *Morgan* v. *Slaughter*, however, Lord Kenyon seems to have entertained a different opinion, for he there held that such a covenant was a fair and usual covenant: (1 Esp. N. P. C. 8.) But in

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*Church* v. *Brown* (15 Ves. 258), Lord Eldon fully recognized the opinion expressed by Lord Thurlow in *Henderson* v. *Hay*, above cited, as did also Sir Wm. Grant in *Brown* v. *Ruban* (15 Ves. 528; see also *Bennett* v. *Womack*, 9 B. & C. 627; *Van* v. *Corpe*, 3 Myl. & Kee. 289; *Propert* v. *Parker*, *ib.* 290.) The granting of an under-lease is not a breach of a covenant not to assign without licence: (*Cruso and Bugby* v. *Blencowe*, 3 Wils. 234; S. C. 2 Black. 766.) Neither is the depositing of the lease as a security with a creditor: (*Doe and Pitt* v. *Laming*, 1 R. & M. 36.) But where a covenant was that the lessee would not set, *let*, or assign the whole or any part of the premises without leave, an under-lease was holden to be a breach: (*Roe and Gregson* v. *Harrison*, 2 T. R. 426.) So where there was a proviso that the lease should be void, "if the lessee assigned or otherwise departed with the indenture of lease for the whole, *or any part of the term*, without leave in writing, it was held that an under-lease was included under those terms: (*Doe and Holland* v. *Worsley*, 1 Camp. N. P. C. 20.)

Lease for the whole term will amount to an assignment.

A lease for the whole term will amount to an assignment, although the rent be reserved to the lessee, and the power of re-entry is given to him, and not to the reversioner: (*Palmer* v. *Edwards*, Doug. 186, n.) Yet the exception of a single day out of the term will be sufficient to render it an under-lease: (*Holford* v. *Hatch*, Doug. 182.) And where a licence to assign is once given, the condition is entirely discharged (*Dumper's case*, 4 Rep. 1196; Cro. Eliz. 815; *Leeds* v. *Crompton*, cited 4 Rep. 120, a; *Brummell* v. *Macpherson*, 14 Ves. 173), and this, whether the licence be given as to the whole or only as to part of the demised premises (4 Rep. 120, a.) Still where the licence to assign is restricted to some specified mode of disposition, as to assign

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by will for example, and which is made by the lessee accordingly, though such assignment is undoubtedly good, yet this will not warrant his executors in making another assignment, and if they do, it will be bad.

Assignment by operation of law no forfeiture.

An assignment by operation of law, as where a lease passes to the assignees upon the bankruptcy of a lessee, will be no breach of a covenant not to assign without licence; neither is an assignment to a person purchasing the term from a sheriff under a *bonâ fide* execution (*Doe dem. Mitchinson* v. *Carter*, 8 T. R. 57), although it clearly would be, if the execution was fraudulently done for the mere purpose of evading the covenant: as where a lessee gives a warrant of attorney to confess a judgment to a creditor for the purpose of enabling such creditor to take the lease in execution: (*ib.*) And if a lease contain a proviso making it void in case the lessee, his executors or administrators, alien without a licence in writing, a voluntary assignment by the executor or administrator without such licence will amount to a forfeiture: (*Roe dem. Gregson* v. *Harrison*, 2 T. R. 425.) And where a lease contains a proviso for determining the term on the lessee's becoming bankrupt, this condition being annexed to the demise itself will avoid the term, and the landlord may in such case re-enter on the property: (*Roe* v. *Galliers*, 2 T. R. 133; *Wilson* v. *Greenwood*, 1 Swanst. 481; *Goring* v. *Warner*, 2 Eq. Ca. Abr. 100; 7 Vin. Abr. 85; *Philpot* v. *Hoare*, Amb. 480; 2 Atk. 219; *Doe dem. Godbehere* v. *Bevan*, 3 Mau. & Selw. 353; *Doe dem. Lloyd* v. *Powell*, 5 B. & C. 308; *Ex parte Shearman*, Buck. 462.)

Bankrupts discharged from covenants, when.

The statute of 6 Geo. 4, c. 17, contains a proviso (s. 75) discharging a bankrupt lessee from his covenants: first, when the assignees accept the lease, in which case it declares that the bankrupt shall not be liable to pay any rent accruing

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after the date of his commission, or to be sued in respect of the nonperformance of any of the covenants. Secondly, where the assignees decline the same. Nor will the bankrupt be liable in case he delivers up the lease within fourteen days after he shall have notice that the assignees shall have declined to accept the lease. In this case the covenants on both sides fall to the ground: (*Kersey* v. *Carstairs*, 2 B. & Ad. 716; see also *Doe dem. Cheere* v. *Smith*, 5 Taunt. 795.) And thirdly, where the assignees do not upon request elect whether they will accept or decline, in which case the Lord Chancellor has power upon petition to order the assignees to elect and to deliver up the lease and possession of the premises: (Selw. N. P. 481.)

Questions as to election by assignees must be tried by a jury.

But this section only empowers the Lord Chancellor to make an order that the assignees shall elect; it does not enable him to determine the question whether the assignees have elected to take the lease or not; he can only send such a question to be tried by a jury: (*Ex parte Quantock*, Buck. 189.) And upon a petition for an order for the assignees to elect, they will be allowed a reasonable time, such as ten days, for instance, to consider what will be most beneficial to the creditors: (*Ex parte Scott*, 1 Rose, 446, n. *a*.)

What acts will be construed as an acceptance by the assignees.

With respect to what acts will be construed to be an acceptance by the assignees, it appears that if they assume the direction and management of the property included in the lease (*Thomas* v. *Pemberton*, 7 Taunt. 201; *Hanson* v. *Stevenson*, 1 B. & Ald. 303), or permit the bankrupt to remain in the occupation of the demised premises, and to carry on the trade for the estate under their directions (*Clarke* v. *Hume*, 1 R. & M. 207; *Gibson* v. *Couthope*, 1 Dowl. & Ry. 205), they will be considered to have accepted the lease. But merely attempting to sell the lease, provided

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they neither take possession, nor exercise any acts of ownership over the premises, will not be so construed (*Turner* v. *Richardson*, 7 East, 355; *Wheeler* v. *Bramah*, 3 Camp. N. P. C. 340); yet if in the endeavour to sell there is a bidding, and the assignees accept it and receive a deposit, it will afford evidence of their assent to take the premises, from which they will not be released, although the contract should be afterwards rescinded: (*Hastings* v. *Wilson*, Holt. Rep. 290.)

Distinction between conditions or provisoes, and covenants not to assign without licence.

Before dismissing this part of our subject, it may not be amiss to point out the distinction between conditions or provisoes for avoiding the term in case the lessee should assign without licence, and where the lessee is restrained from so doing by covenant only; which seems to be, that where the lessee is restricted from assigning, and there is a condition or proviso for avoiding the term in case of a breach thereof, and the lessee assigns, his estate will be thereby determined and his assignment will be actually void. But if the lessee be restrained from so assigning, by covenant only, although thereby he will be guilty of a breach of covenant, yet the assignment itself is not void: (*Paul* v. *Nurse*, 8 B. & C. 488.) But where the clause commences as a proviso, the addition of the terms "it is hereby covenanted," will not convert it into a covenant. Thus, where a lease for years of land for fifteen years contained the following clause:—"Provided always, and it was thereby declared and agreed, that if the lessor should from time to time during the term be minded to have any part of the land delivered up to him, and should give three months' notice thereof, the lessee did thereby covenant peaceably to surrender up, and that the lessor might take peaceable and quiet possession of such part or parts of the lands as should be included in the notice; the lessor paying to the lessee a fair compensa-

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tion in respect of moneys laid out in improving the condition of so much of the land as should be given up; and that thenceforth the rent should be reduced proportionably, and the remainder of the land be held at such reduced rents;"—it was holden that this was a condition, and not a mere covenant on the part of the lessee; the proviso being construed in substance that in case the lessor should at any time during the continuance of the term be desirous of having any part of the premises, he might determine the interest of the lessee as to the whole of the lands by a three months' notice; and that the lessee covenanted to give up and that the lessor should take quiet possession, paying a reasonable and fair compensation in respect of the money which may have been laid out by the lessee in the improvement of the land: (*Doe dem. Gardner* v. *Kennard*, 11 L. T. 288.) Acceptance by the lessor of rent due after breach of a covenant of this kind, *with notice*, will also be a waiver of the forfeiture: (*Whichcott* v. *Fox*, Cro. Jac. 398; *Goodright and Walter* v. *Davids*, Cow. 804.) But a court of equity will not relieve against a forfeiture thus incurred: (*Hill* v. *Barclay*, 18 Ves. 63.)

## SECTION II.

### TITLES TO RENEWABLE LEASEHOLDS.

Upon what the title to renewable leaseholds will depend.

The title to renewable leaseholds, as far as such right of renewal is concerned, will depend either upon a tenant right of renewal, or upon express covenants for that purpose. With regard to the former, in the case of leases under the crown, ecclesiastical corporations, colleges, &c., if the tenant is willing to pay the fine and rent demanded, he is seldom turned out of possession.

Tenant right of renewal.

This preference in equity is termed the tenant right, which, though no certain or even contingent interest in law, there being no actual means of compelling a renewal, is yet, to a certain extent, a right recognized in equity (*Jones* v. *Powell*, 4 Bea. 96); so that, wherever a grant of a reversionary lease is obtained to the prejudice of the old tenant by undue means, whether by *suggestio falsi* or *suppressio veri*, the party obtaining it, though a mere stranger, or a purchaser with notice, shall not be permitted to hold it to his own use: (*Parker* v. *Brooke*, 9 Ves. 482.) Whoever, therefore, has a tenant right of renewal in a lease has an interest in the renewal; so that when an additional term is granted, the old term may be said to be still in being, and the renewed interest will be subject to all its incidents and liabilities: (*Palmer* v. *Young*, 1 Vern. 276; *Rawe* v. *Chichester*, Amb. 719; *Winslow* v. *Tighe*, 2 Ball & B. 205. See also *Collet* v. *Hooper*, 13 Ves. 258: *Featherstonhaugh* v. *Fen-*

*wick*, 17 *ib.* 298.) Strictly speaking, however, a right of renewal must be the result of express contract, and to secure it is the object of the covenant for renewal occasionally contained in leases: (1 Platt Leases, 705.)

Leases under covenants for renewal.

The right of renewal under a covenant may be for a limited term, or perpetual. Generally speaking, however, covenants for perpetual right of renewal are not much favoured (*Baynham* v. *Guy's Hospital*, 3 Ves. 295; *Moore* v. *Foley*, 6 *ib.* 232); though such a right may be clearly conferred where the lease is granted by persons entitled to the fee-simple and inheritance of the demised property: (*Bridges* v. *Hitchcock*, 5 Bro. P. C. 6.) Yet, as a covenant of this kind is construed strictly in favour of the lessor, a covenant to renew under the same covenants as contained in the original lease has been held not to include a covenant for perpetual renewal. Hence, where A. by indenture, in consideration of a certain sum in the nature of a fine and of a yearly rent, demised land for twenty-one years, and covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with *all* covenants as in that indenture were contained," it was holden that this covenant was satisfied by a tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal: (*Iggulden* v. *May*, 7 East, 237. See also *Hyde* v. *Skinner*, 2 P. Wms. 196; *Redshaw* v. *Bedford Level Company*, 1 Eden, 349; *Lee* v. *Vernon* (*Lord*), 5 Bro. P. C. 10; *Tritton* v. *Foote*, 2 Bro. C. C. 636; *Doe dem. Hardwicke* v. *Hardwicke*, 10 East, 549.) And the same construction is put upon such a covenant in equity; and such construction ought not (as was permitted to be done

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in *Cooke* v. *Booth*, Cow. 819) to be affected by the previous acts of the parties: (*Baynham* v. *Guy's Hospital*, 3 Ves. 295; *Eaton* v. *Lyon*, *ib.* 691; *Moore* v. *Foley*, 6 *ib.* 232; *City of London* v. *Mitford*, 14 *ib.* 50; *Watson* v. *Hemsworth Hospital*, *ib.* 324; *Willan* v. *Willan*, 16 *ib.* 72; *Dowling* v. *Mill*, 1 Mad. 548; *Higgins* v. *Rose*, 3 Bligh, 113.) And notwithstanding the court will lean against construing a covenant to be for a perpetual renewal, still, if it clearly appears to be so, it must be specifically executed; and a purchaser from a tenant in tail, with notice from him of an agreement to renew a lease under which his father as tenant for life had agreed to renew, is bound to renew accordingly: (*Brook* v. *Bulkeley*, 2 Ves. 498.)

How the right of renewal may be lost.

A right of renewal may be lost by the laches of the tenant in neglecting to make his application within the time prescribed by the covenant. Hence, where a lease for sixty-one years contained a covenant that at any time within one year after the expiration of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease to the lessee of the same premises, *for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c., and so in like manner* at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease *for the further term of twenty years, to commence at the end and from the expiration of the term last before granted, &c.*, it was holden that, under this covenant, the lessee could not claim a further term of twenty years at the expiration of the last twenty years in the lease, if he has omitted to claim a further term at the end of the first and second twenty years of the

lease: (*Rubery* v. *Jervoise*, 1 T. R. 229.) Nor, it seems, would equity afford relief to the lessee in a case of this kind. Thus, in *Allen* v. *Hilton* (cited 1 Fonbl. Eq. 432, n. *c*), a defendant had covenanted to renew the plaintiff's lease, at the request of the plaintiff, within three months before the expiration of the then granted lease. The lease being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to lease the premises to other persons. The plaintiff, being then in possession, applied for a new lease, which the defendant refusing, he filed his bill. The Lord Chancellor was clearly of opinion that the plaintiff, having omitted to apply at the time agreed on, was not entitled to relief; observing, that if a lessee were relievable in such a case, he knew not where the court could stop; it would be saying that the lessee shall be loose and the lessor bound. In the case of *Baily* v. *Corporation of Leominster* (3 Bro. C. C. 529), Lord Thurlow held that a lessee for lives entitled by covenant to a renewal on application whenever one of the lives should fall, was not entitled to such renewal upon his application when two lives were dropped, though he offered to pay the fines for both lives; his lordship observing that the covenants were not mutual: (*M'Alpine* v. *Swift*, 1 Ball & B. 285.) And even when a lease contains a covenant for perpetual renewal, a specific performance has been refused under circumstances of gross laches, and where there had been such an alteration in the property as that it could not be enjoyed according to the stipulations: (*City of London* v. *Mitford*, 14 Ves. 41; *Mauntnorris* v. *White*, 2 Dow. 459; *Boynham* v. *Guy's Hospital*, 2 Ves. 295; see also *Browne* v. *Tighe*, 2 Cla. & Fin. 396; 8 Bligh, N. S. 272.)

How the benefit of covenants for

Covenants for renewal run with the land (*Shelburne* v. *Biddulph*, 1 Bro. P. C. 383), are

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renewal is transmissible.

transmissible to the personal representatives of the lessee (*Chapman* v. *Dalton*, Plow. 284; *Hyde* v. *Skinner*, 2 P. Wms. 196), and are binding, not only on the lessor and his heirs, but also on a future purchaser of the inheritance: (*Richardson* v. *Sydenham*, 2 Vern. 447.) But where the former lease was in settlement, the renewed lease will be liable to the same trusts: (*Taster* v. *Marriot*, Amb. 68; *Owen* v. *Williams*, *ib.* 734; *Bowls* v. *Stewart*, 1 Sch. & Lef. 209; *Brookman* v. *Hales*, 2 Ves. & Bea. 45.) So, whenever a lease is renewed by trustees, it will be subject to the trusts of the old one (*Roe* v. *Chichester*, Amb. 719; *Griffin* v. *Griffin*, 1 Sch. & Lef. 352), and this, notwithstanding the lessor would not have granted a renewal to the *cestuis que trust* (*Fitzgibbon* v. *Scarlan*, 1 Dow. 269); and where the owner of a partial interest, as a tenant for life, or a mortgagee in possession, renews a lease of this kind, equity will consider such person, after his own particular interest has ceased, simply as a trustee for the persons beneficially entitled under the pre-existing lease: (*Palmer* v. *Young*, 1 Vern. 276; *Rawe* v. *Chichester*, Amb. 719; *Parker* v. *Brooke*, 9 Ves. 583; *Collet* v. *Hooper*, 13 *ib.* 258; *Featherstonhaugh* v. *Fenwick*, 17 *ib.* 302; *Winslow* v. *Fisher*, 2 Ball & B. 205, 206.) But although the personal representatives of a lessee are entitled to the benefit of a covenant for renewal, the assignees of a bankrupt have been held to possess no such right: (*Vandmanker* v. *Desborough*, 2 Vern. 96.)

Contribution for defraying costs of renewal.

All persons beneficially interested in the renewal of a lease are bound to contribute in defraying the expense thereby incurred, in proportion to the interests they respectively take in the property: (*Adderley* v. *Clavering*, 2 Bro. C. C. 658; S. C. 2 Cox, 192.) With respect to the portions that each party was to bear, the rule formerly seems to have been for the tenant for

life to pay one-third, and for those in remainder to pay the residue: (*Verney* v. *Verney*, 1 Ves. sen. 428; S. C. Amb. 88.) Lord Alvanley, however, seems to have considered that the tenant for life was to pay nothing but the interest: (*Buckridge* v. *Ingram*, 2 Ves. 652.) But Lord Eldon has disapproved of this doctrine, on the ground of the possible inequality, and seems to have considered that the cases had decided it was better to determine the proportion upon fact than speculation (*Nightingale* v. *Lawson*, 1 Bro. C. C. 140; *Stone* v. *Theed*, 2 *ib.* 243); therefore, if the tenant for life is bound to pay in any degree, he ought to pay in proportion to the benefit he *de facto* took under the effect of the transaction; and that the remainder-man ought also to pay with reference to his proportion of the benefit (*White* v. *White*, 9 Ves. 554); so that if the latter receives the entire benefit of the renewal, as where the tenant for life is himself one of the lives upon which the lease is determinable, the whole of the expenses must be defrayed by the remainder-man, for here the tenant for life receives no benefit whatever from the renewal (the existing lease being at least as durable as his interest), and any money expended by him in effecting such renewal will be a charge on the estate: (*Adderley* v. *Clavering*, 2 Bro. C. C. 658; S. C. 2 Cox, 192.) There is no difference in this respect between a renewable term for years, and a lease for lives renewable: (per Lord Eldon, 9 Ves. 559.)

*Of renewed leases under ecclesiastical persons.*

Where leases have been renewed by ecclesiastical persons, it must be ascertained that the old lease has been properly surrendered, for this has often been ineffectually done, and the title has proved defective in consequence. This has occurred where surrender has been made by the *cestui que trust*, instead of by the legal tenant; or where no actual surrender is made, and the

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new lease, instead of being granted, as it ought to be, to the legal tenant under the former lease, is granted to the *cestui que trust*, so that there is no virtual surrender of the subsisting lease; and whenever these defects occur, it will be requisite, in order to complete the title, that the persons having the legal estate should make an effectual surrender and obtain a new lease under such surrender; for, unless this be done, such a voidable lease, although good against the actual lessor who granted it, will not be binding on his successors; therefore, as soon as a defect of this kind is discovered, no time should be lost in rectifying it, by adopting the course above suggested.

Practical suggestions as to the surrender and renewal of leases.

To accomplish this object, it is requisite that the old lease should either be surrendered by the parties who take the legal estate therein before the new lease is granted; or should be surrendered in point of law by the acceptance of such new lease by the parties having the legal estate under the old one, or should be surrendered, ended, or determined within a year from the making of the lease: (32 Hen. 8, c. 28; 1 Ins. 44, b; 2 Prest. Abs. 10, 11.) The surrender ought also to be made to him who has the immediate reversion or remainder, otherwise it will be inoperative: (Co. Litt. 3376; 2 Roll. Abr. 494, c. 12; Cro. Eliz. 803.) He who has the immediate reversion may take a surrender, whether he has it in fee, or in tail, or for life: (2 Roll. Abr. 494, c. 12.) And whatever doubts may have once existed, it is now settled that a possessory term of years will merge in a reversionary one of the same premises, where they both meet in the same parties, whether the term in reversion be greater or less in point of duration of time than the term in possession; so that a possessory term of one thousand years will merge in a reversionary one of twenty, ten, or even a shorter term: (Bac. Abr. tit. Leases, s. 2; *Hughes* v. *Robotham*, Cro. Eliz. 302; *Challoner*

v. *Davis*, 1 Lord Raym. 401; 1 Prest. Abs. 12.) But a possessory term which a person takes, in *autre droit*, or by operation of law, as executor, or administrator, or in right of his wife, although he be seised of the freehold at the time of his marriage (*Bracebridge* v. *Cook*, 1 Plow. Com. 417), will not merge in the freehold or inheritance, or, it seems, a reversionary term which he had before such possessory term became vested in him by such act of law: (*Polyblank* v. *Hawkins*, Doug. 329.) Nor will a term so held in another's right be merged by a subsequent descent of the remainder or reversion: (*Platt* v. *Sleep*, Cro. Jac. 275.) But if the person possessed of a term of years, either in his own right, or right of his wife (Godb. 2; Moore, 54, pl. 157), were to purchase such immediate remainder or reversion in the same property, it would effect a merger, even though he be only a trustee of the term; because here he acquires such reversion, &c., by his own act; whereas, in the former instance, it is cast on him by operation of law: (Bro. Abr. Extinguishment, 54; Leases, 63; Surrender, 52; 3 Leon. 111; 2 Roll. Rep. 742; 1 Roll. Abr. 434, pl. 102; 4 Leon. 57, pl. 102; Hetley, 36; 2 Freem. 289, pl. 338.)

Merger.

An intermediate estate in a third party will prevent a merger. Thus, A. made a mortgage for a term of 500 years, and afterwards made another mortgage for a like term. Both the mortgages were satisfied, and the terms were assigned to distinct trustees, upon trust to attend the inheritance. Some time afterwards, the owner of the fee took an assignment of the first term, with the intent to merge it, or have it surrendered; but it was held that the merger was prevented by the intervention of the other term, outstanding in another person: (*Whitchurch* v. *Whitchurch*, 2 P. Wms. 236; see also *Duncomb* v. *Duncomb*, 3 Lev. 437; *Bate's case*, Salk. 254;

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Intermediate estate.

*Wrottesly* v. *Adams*, Plow. 191; *Scott* v. *Fenboullett*, 1 Bro. C. C. 69.) When, therefore, it was deemed advisable to keep several terms on foot to attend the inheritance, the mode was to interpose an intermediate estate between each term; and thus two trustees might have held any number of terms between them, without any danger of a merger taking place. For example: suppose four terms to be created, respectively, in the years 1750, 1760, 1770, 1780, in which case, if the terms of 1750 and 1770 are assigned to one trustee, and the terms of 1760 and 1780 to another trustee, all the terms are by this means preserved; there being an intermediate estate between each term. But if the terms of 1750 and 1760 had been assigned to one trustee, and the terms of 1770 and 1780 to the other, then for want of such intermediate estates, the term of 1750 would have merged in the 1760, and the term of 1770 in the term of 1780.

Practical remarks.

The doctrine above laid down, as Mr. Preston very accurately remarks, shows how cautious the conveyancer should be in surrendering a term; for though it may be well known that this should be made to the person entitled to the next immediate estate in remainder, or reversion, yet this cannot always be done with certainty, for want of knowledge of the precise state of the title; and that it seems advisable to make the surrender by deed-poll, and generally to the person or persons having the next immediate estate in remainder, or reversion; by which mode, it seems, the term would be effectually extinguished. The same learned writer also adds, that the practice of using words of assignment, as well as of surrender, is still more eligible and safe: (2 Prest. Abs. 14.)

## SECTION III.

### OF ASSIGNMENTS.

1. *Modes by which Leasehold Property may be assigned.*
2. *How a Term of Years should be assigned by Deed.*
3. *Of limited Interests in Leasehold Property.*
4. *Assignments by Will.*
5. *Of the Assent of the Executor.*

### 1. *Modes by which Leasehold Property may be assigned.*

Assignments of leases.

As the law stood previously to the recent statute 8 & 9 Vict. c. 106, a term of years in lands might have been assigned by writing without deed, provided it was assigned by the party and properly stamped : (*Rex* v. *Little Dean*, Str. 555; *Farmer dem. Earl* v. *Rogers*, 2 Wils. 26; *Beak dem. Fry* v. *Phillips*, 5 Bur. 2827.) Previously, indeed, to the Statute of Frauds (29 Car. 2, c. 3, s. 2), it might have been effected by parol; and notwithstanding that statute requires all assignments to be in writing, still, until the statute of 8 & 9 Vict. it was not required to be done by deed, but might have been effected either by a deed or by a mere note in writing signed by the assigning party or his lawfully authorized agents. By the modern Stamp Acts,

however (44 Geo. 3, c. 78; 55 Geo. 3, c. 184), all instruments of assignment, whether by deed or note in writing, must be stamped with the common deed stamp: (Coventry on Stamps, 196.) Still, although a stamp of this kind was necessary to give validity to the assignment, such assignment might yet have been made by a simple note in writing; but now the act of 8 & 9 Vict. declares all assignments, *not being an interest which might have been created without writing*, made after the 1st of October, 1845, to be void at law unless made by deed. But, for all this, a mere note in writing, if duly signed by the parties, will, nevertheless, be supported in equity as an agreement, and as such pass the equitable interest in the premises. As this statute does not require the assignment to be by deed of such interests as might by law have been created without writing, it seems that a parol lease, not exceeding three years and valid as such under the Statutes of Frauds, may even now be assigned by a simple note in writing, if stamped with a deed stamp.

### 2. *How a Term of Years should be assigned by Deed.*

How a term of years should be assigned by deed.

The proper technical words of an assignment are "assign, transfer, and set over." But the words "give, grant, bargain and sell," or any words which show the intent of the parties to make a clear transfer, will have that effect (4 Cru. Dig. 97, s. 20); neither is any consideration necessary: the tenure, attendance and subjection to forfeiture, as also the payment of the rent, if there be any, being sufficient to vest the term in the assignee: (*ib.* s. 18.) But an assignment without consideration would be void as against existing creditors at the time of such assignment (1 Mad. 271, 273); as also against purchasers

for valuable consideration, even with notice: (*Townsend* (*Lord*) v. *Wyndham*, 2 Ves. sen. 1; *Gilham* v. *Lock*, 9 Ves. 612; *Curtis* v. *Price*, 12 *ib.* 103; *Jones* v. *Croucher*, 1 Sim. & Stu. 315.) With respect to the parcels, it should be ascertained that they correspond either in express terms or by certain reference to those contained in the lease. The *habendum* also should embrace all the assignor's interest in the term, for if it passes a lesser estate, it will confer an under-lease. It was indeed formerly considered that the mere reservation of rent, or of a right of entry by a termor in an instrument purporting to be an under-lease, but in point of fact comprising all the estate of the owner, was an under-lease; in short that it was a lease as between the parties: (4 Cru. 97; *Pulteney* v. *Holmes*, Str. 405.) But it is now settled, that though the instrument import to be a lease, yet if it does in effect comprise *all the estate* which resides in the grantor, it amounts to an *assignment*, and is not an under-lease; and a right of entry, or a reservation of rent, will not change the nature of the estate: (*Palmer* v. *Edwards*, Doug. 187, n.) And, on the other hand, if it leaves any portion of the estate in the lessor, even a day, an hour, or a minute, as a reversion, it is an under-lease, and therefore an instrument purporting to be an assignment for the residue of a term, reserving the last day or hour, will operate as a lease of this description: (2 Prest. Con. 124.) But it seems that the reservation of a former part of the estate; as to hold, for example, from a day to come or from an event to happen, unless it is to happen on the death of the person by express limitation (*Jermin* v. *Orchard*, Show. P. C. 199), will not prevent the instrument from taking effect as an assignment: (2 Prest. Con. 125.) And notwithstanding that when the *habendum* limits the estate to commence at a future period,

Distinction between an assignment and an under-lease.

there is an evident repugnance between the grant which limits all the assignor's interest, and the *habendum* which directs that it shall commence at a future period—it being essential to the validity of an assignment that it should pass an *immediate* interest—still this will not avoid the assignment, which will take effect instantly, and the *habendum* will be rejected for repugnancy, upon the long-established principle, that where there is any repugnancy between the premises and the *habendum*, the former shall be retained and the latter rejected: (Plow. 524.)

Usual covenants in assignments.

In assignments, as in ordinary conveyances of the fee, the assignor qualifies his covenants for title to his own acts and those of the parties through whom he claims, or who shall claim through him. Such covenants usually run thus, viz.: that the lease is valid—that all outgoings, such as rent and taxes, have been paid, and all covenants and conditions performed—that the vendor has good right to assign—for quiet enjoyment — freedom from incumbrances — and for further assurance. The usual covenants on the part of the purchaser are, to pay rent and perform the covenants reserved and contained in the lease, and to save the assignor harmless therefrom, and for which, as we have already seen, he remains liable to the lessor, notwithstanding the assignment of his estate, and the actual acceptance by the lessor of such assignee as his tenant. Where only a portion of the property contained in the original lease is sold, then the party who is to have the possession of the lease enters into a covenant with the other party for its production.

### 3. *Of limited Interests in Leasehold Property.*

Settlements of leasehold property.

Estates for years are often the subject of settlements, for though, strictly speaking, an estate

tail cannot be created out of them, as that can only be done of estates of inheritance, still, terms of years may be so settled as to answer the purposes of an entail, and be rendered inalienable for almost as long a time as if they really were entailed, in the strictest sense of the term.

How settlements of leasehold property may be best effected.

This may be done either by deed of trust, or by executory devise, provided no attempt be made to tie up the property beyond the duration of lives in being and twenty years after (*Long* v. *Blackall*, 3 Ves. 486; *Newcastle* (*Duke of*) v. *Lincoln* (*Countess of*), 3 *ib.* 317; *Thelluson* v. *Woodford*, 4 *ib.* 232); and, perhaps, in the case of a posthumous child, a few months more; a limitation of time not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail for a longer period. If, therefore, the executory limitations be on contingencies too remote, the whole property will vest in the first taker, and the limitations over will fail altogether (*Ware* v. *Polhill*, 11 Ves. 257); and, generally speaking, if the property be limited in terms which, if it were freehold property, would create an estate tail, it will give the absolute interest in chattels, as well real as personal, and all the subsequent limitations will be void (*Freyes* v. *Robinson*, Bunb. 38; *Bennett* v. *Lewknor*, Roll. Rep. 356; *Love* v. *Wyndham*, 2 Cha. Rep. 14; S. C. 1 Lev. 290; *Richards* v. *Bergavenny*, 2 Vern. 324; *Seale* v. *Seale*, Pre. Cha. 421; *Doe* v. *Dickenson*, 8 Vin. 451, pl. 25; *Stratton* v. *Payne*, 2 Eq. Ca. Abr. 325; *Butterfield* v. *Butterfield*, 1 Ves. sen. 133; *Hodgeson* v. *Bussey*, 2 Atk. 82; *Beauclerk* v. *Dormer*, *ib.* 308; *Read* v. *Snell*, *ib.* 642; *Sabberton* v. *Sabberton*, For. 245; *Glover* v. *Strothoff*, 2 Bro. C. C. 33; *Robinson* v. *Fitzherbert*, *ib.* 127; *Chatham* (*Earl of*) v. *Daw Tothill*,

7 Bro. P. C. 453; *Chandless* v. *Price*, 3 Ves. 99; *Croke* v. *De Vandes*, 9 *ib.* 197; *Ware* v. *Polhill*, 11 *ib.* 257; *Elton* v. *Eason*, 19 *ib.* 73; *Bennett* v. *Tankerville* (*Earl of*), *ib.* 170; *Southampton* (*Lord*) v. *Hertford* (*Marquis of*), 2 Ves. & Bea. 63; *Brouker* v. *Bagot*, *ib.* 574; *Britton* v. *Twining*, 3 Mer. 176; *Crawford* v. *Trotter*, 4 Mad. 360); so that, in point of fact, in the case of a term of years and personal chattels, the vesting of an interest which in freehold property would be an estate tail, bars the issue and all subsequent limitations as effectually as a fine and recovery would formerly have done, and a disentailing deed would now do, in the case of estates entailable within the statute *de Donis*. Lord Coke, however, in *Leonard Lovie's case*, seems to have taken a distinction between a term in gross and a term *de novo* out of the inheritance, and to have considered that a limitation of a term *de novo* to a man and the heirs of his body shall enure no longer than he has heirs of his body: (10 Rep. 87.) But this distinction has been long since exploded. In *Burgis* v. *Burgis* (6 Mod. 115), Lord Keeper Finch said he did deny Lord Coke's opinion in *Leonard Lovie's case*, and Lord Nottingham expressed a similar opinion in the *Duke of Norfolk's case* (3 Cha. Cas. 1), the correctness of which has never since been doubted.

Construction of the words "dying without issue," and similar expressions in a will of leasehold property.

But although, generally speaking, the same words which would create an estate tail in freehold property will pass the absolute interest in a term of years, and this equally whether the terms employed would have been sufficient to create an estate tail expressly, or have raised it by implication (*Lamb* v. *Archer*, Salk. 215; *Wilkinson* v. *South*, 7 T. R. 555), still, in the construction of a will disposing of a term, or other chattel property, the courts have allowed words to control the usual and technical import of the

words "dying without issue," or other similar expressions, to the death of the first devisee, which they would not formerly have done in the case of a devise of real estate, though now, since the late Will Act, 1 Vict. c. 26, the dying without issue, if limited so as to confine it to the death of the party, would, as to devises subsequent to the year 1837, be confined to the death of the first taker, in the case of freehold estate, as well as in a term of years: (see *ante*, p. 315.) The reason for adopting this construction in the case of chattel interests was to give effect to the limitations over, which, as we have already seen, could not have taken effect if the first limitation had been construed sufficient to pass an estate tail; and hence, although in a devise of freeholds the words "leave no issue," or, "leaving no issue," would have been considered insufficient to have confined the dying without issue to the time of the decease of the first taker (*Forth* v. *Chapman*, 1 P. Wms. 663; *Dansey* v. *Griffith*, 4 Man. & Selw. 61), yet, in the case of bequests of personal estate, and for the reasons above laid down, the construction would have been different. This, as we have already seen, is fully exemplified by the case of *Forth* v. *Chapman*, *ante*, p. 322, where the words "*leaving no issue*" were taken in two different senses as to the two different species of property, and as to the freehold, to be construed to mean a dying without issue generally, and as to the leasehold, to be confined to the death of the first taker: (*Atkinson* v. *Hutchinson*, 3 P. Wms. 258; *Reed* v. *Snell*, 2 Atk. 642; *Lampley* v. *Blower*, 3 *ib.* 396; *Goodtitle* v. *Pegden*, 2 T. R. 720.) In addition to this, the courts in many cases have allowed other expressions, where the intent has been apparent, to confine the dying without issue to the death of the first taker, so as to give effect to the ulterior limitations (*Pin-*

*bury* v. *Elkin*, 1 P. Wms. 563; *Stratton* v. *Payne*, 3 Bro. P. C. edit. Toml. 99; *Sheffield* v. *Orrery*, 3 Atk. 282; *Trotter* v. *Oswald*, 1 Cox, 317; *Wilkinson* v. *South*, 7 T. R. 555; *Smith* v. *Frederick*, 1 Russ. 174); for if the contingency of dying without issue depends upon the life or lives of persons in being, an executory bequest limited thereon will be good: (*Lamb* v. *Archer*, 1 Salk. 225.) Thus, if the limitation over is only for life (*Oakes* v. *Chalfont*, Pollexf. 33; *Trafford* v. *Boehm*, 3 Atk. 449), or to the survivor of one, or two, or more persons (*Nicholls* v. *Skinner*, Pre. Cha. 258; *Sayer* v. *Hughes*, 1 P. Wms. 534), or the dying without issue is limited to the death of the first taker under twenty-one (*Thoustout dem. Small* v. *Denny*, Wils. 270), or to the death of the testator himself (*French* v. *Caddell*, 2 Bro. P. C. 257; *Wellington* v. *Wellington*, 1 Black. 645), the contingency must necessarily take place during the lives of persons in existence at the time of the testator's death, and thus fall within those limits which the law permits for the vesting of an executory devise.

### 4. *Assignments by Will.*

As to wills of leasehold property.

As wills of personal estate were not within the Statute of Frauds, leasehold property might have been assigned, not only by an unattested will (Swin. 558; Shep. Touch. 408; Gilb. 92; God. pt. 1, c. 1. s. 7; *Wright* v. *Walthoe*, Com. Rep. 452; *Worlick* v. *Pollett*, before the Delegates, 1711; *Loveday* v. *Claridge*, Com. 452; *Ex parte Dy*, 1 Hagg, 219; *Walker* v. *Walker*, 1 Mer. 515; *Salmon* v. *Hays*, 4 Hagg. 382); but even by a mere unsigned writing, written by the testator himself, or by some other person by his direction (*Worlick* v. *Pollett*, and other cases cited in *Limberry* v. *Mason*, Com. Rep. 452;

2 Black. Com. 501; *Rymes* v. *Clarkson*, 1 Phill. 22; Went. c. 1, p. 15, 14th edit.; Wms. Exors. 54); but now, under the late statute 1 Vict. c. 26, s. 9, the same solemnities are required in a will of personal as of real estate.

Probate of will evidence of due execution of will of personal estate.

In the case of a will of personal estate, the probate affords satisfactory proof that the will is legally executed; still, in order to confer a good title to a term of years thereby bequeathed, it must also be shown that such probate was obtained in the proper ecclesiastical court; and, further, that the executor assented to such bequest. The questions that have most frequently arisen in cases of probate or administration, are where a term has been vested in a trustee whose representatives have proved the will or taken out administration in a court which has no jurisdiction over the land included in the term (*Re Mary Powell*, 3 Hagg. 195); for it often happens that the personal representatives of a deceased trustee are ignorant altogether of his being a trustee of a term, and therefore merely prove his will, or take out administration with reference to the assets which the testator or intestate takes in his own character, without reference to those which he takes as a trustee. The chances, also, of errors of this kind are considerably increased in consequence of the number of courts that have jurisdiction of the assets of testators or intestates.

Statement as to proof of wills by real property commissioners.

A very clear and correct statement, as to the proof of wills and taking out administration in cases of terms of years, is given by the real property commissioners in their second report, p. 67, *et seq.*, where it is laid down "that a will must be proved, or letters of administration taken out in the court of the ordinary who has jurisdiction over the assets of the testator or intestate." In the case of a trustee of a term, if all his effects, including the land in the term, are

within the jurisdiction of the same court, out of that court should the probate or administration issue. If he leaves personal effects in one diocese or peculiar, the land in the term being in another diocese or peculiar within the same province, either Canterbury or York, probate or administration should be obtained in the Prerogative Court of that province. If he leaves effects within one of the two provinces, and the land in the term be within the other province, probate or administration must be obtained, either in the Prerogative Court of that province, or in an inferior court, as circumstances may require; but, on account of the term, probate or administration must be obtained either in the Prerogative Court of the other province, or, if he had no other assets besides the term, in the inferior court of the ordinary having jurisdiction over the place where the land in the term is situated.

Defect where will is proved in wrong court, how proved.

If the will of a deceased trustee of a term be proved in an inferior court not having jurisdiction over the place where the land in the term is situated, or in an inferior court having such jurisdiction, when the testator left other assets out of that jurisdiction, but within the same province in which the land in the term lies, or in the Prerogative Court of one province, when the land in the term is within the other province, and the executor so proving should assign the term, yet, although he could make the assignment, no use could be made of it, as the probate he had obtained would not, in proving the title to the term, be admitted as evidence to prove that he was executor. But the assignment, though made by an executor who, as to the term, has not proved the will in the proper court, will be rendered available, if the will should, either in the lifetime of the executor, or after his decease, be proved in the court in which it ought to have been originally proved with reference to the term.

as part of the assets of the testator; for then such subsequent probate would be admissible in evidence: (*ib.*) But the assignment from a person who has administered in a wrong court would be absolutely void: (*ib.* 58.)

Recent practice to avoid the transmission of a will of a trustee to the Prerogative Court, where it has been proved in a wrong one.

If all the assets of a deceased trustee of a term, including the term, be in the same province, and his will be proved in an inferior court not having jurisdiction over the place where the land in the term is situated, or in an inferior court whose jurisdiction embraces the land in the term, but does not extend to the other assets, according to a practice recently adopted, to avoid the transmission of the will from the inferior court to the Prerogative Court, letters of administration limited to the effects of the deceased trustee, so far as regards the term, are granted by the Prerogative Court to some person for the purpose of assigning the term; and in that case the title to the term, even if it should have been previously assigned by the executor of the trustee, is traced from the trustee through the medium of the assignment from the limited administrator: (*ib.*) If a trustee of a term has died intestate, and it afterwards becomes requisite to have the term assigned, and there is then no administrator of the deceased trustee, or one who derives his qualification from a court whose jurisdiction does not embrace the land in the term, it is usual in these cases to obtain letters of administration, limited to the effects of the trustee, so far as regards the term; and in cases of this kind, administrations from the Prerogative Court are to be preferred, because an administration granted by a Prerogative Court, even when it has no authority to grant it, is good till repealed, and all the mesne acts of the administrator are valid; but an administration granted by an inferior court, when the same ought to have been granted by the Prerogative Court, is absolutely void, and

all the mesne acts of the administrator are invalid; so that the assignment of the term by the limited administrator from the Prerogative Court would stand good, although that Court, supposing the intestate not to have left assets, including the term, in more than one inferior jurisdiction, may have exceeded its authority in making the grant; on the other hand, the assignment of the term by the limited administrator from the inferior court would be absolutely void, if it should afterwards be discovered that the intestate left assets in more than one inferior jurisdiction.

*Executorship when transmissible.*

Important questions sometimes arise with respect to the transmission of the interest from one executor to another. In order that it may be so transmissible, it is necessary that the first executor should have proved the will of his testator, which, having done, he may then transmit the interest vested in him as such executor to his own executors; or, in other words, the executor of an executor having proved the will is the executor or personal representative of the first testator: (Bro. Abr. tit. Administrator, pl. 7.) But in order to render himself so he must prove the will of his own testator in the proper court, and upon this subject, it must be confessed, the cases are somewhat contradictory.

*Fowler v. Richards.*

In *Fowler* v. *Richards* (5 Russ. 39), Sir John Leach held, that where a testator's will is proved in the Prerogative Court of Canterbury, and the surviving executor's will is proved in the Diocesan, the executor of the executor is the representative of the original testator, and that it was not necessary that the second will should be proved in the Prerogative Court. Sir L. Shadwell seems, however, to have thought differently, and in *Jernegan* v. *Baxter* (5 Sim. 568), he said that, before he acted upon *Fowler* v.

*Richards*, he should direct a case for the opinion of a court of law. And the prevailing opinion now certainly seems to be, that where a testator's will is proved in the Prerogative Court, and his executor's will is proved in the Diocesan Court, the executor of the executor is not the personal representative of the original testator: (*Twyford* v. *Trail*, 7 *ib.* 92; *Williams* v. *Bland*, Law T. May 9, 1846.)

Representation only transmissible through executors.

It must always be kept in mind that transmissions of this kind can be only carried on through executors; for the administrator of an executor of A. (*Ley* v. *Anderton*, Sty. 225), or the executor of the administrator of A., is not A.'s personal representative: (*ib.*) An administrator is merely an officer of the ordinary, in whom the deceased has not reposed any trust, and therefore, on the death of such administrator, it results back to the ordinary to appoint another. In these cases, therefore, where the course of a presentation from executor to executor is interrupted by an intestacy, it becomes necessary that the ordinary should grant a new administration of the goods of the deceased, not administered by the former executor or administrator, as the case may be; and such administrator *de bonis non* will then become the legal representative of the deceased: (Selw. N. P. 736.) The cases where an administration of this kind will be necessary, are:— 1. Where the executor of the deceased, having proved the will, dies intestate, without having fully administered the personal estate of his testator: (*Wankford* v. *Wankford*, Salk. 299, 305.) 2. Where there are several executors, and the surviving executor, having proved the will, dies intestate: (Bro. Abr. Exors. pl. 14.) 3. Where the administrator dies before he has administered the whole personal estate of the deceased: (*Hirst* v. *Smith*, 7 T. R. 182; Selw. N. P. 786.)

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Property taken by personal representatives not liable to forfeiture.

As an executor or administrator is considered as holding in right of his testator or intestate, and not in his own right, the interest which he takes in such property in his representative capacity will not be subject to forfeiture by his being attainted of treason or felony, or be liable to be taken in execution for his own proper debt: (Off. Exors. 85; Toll. Exors. 133; *Rutland* v. *Rutland*, 2 P. Wms. 212; *Marlow* v. *Smith*, *ib.* 200; *Farr* v. *Newman*, 4 T. R. 621.) Neither in case of his becoming a bankrupt will his interest as executor be thereby affected. Nor, as I have already remarked, will a term which he takes as executor merge in the reversion which he has in his own right: (*ante*, p. 408.) Upon the same principle also, if an executrix marry, although the personal chattels which she is possessed of in her own right will become vested absolutely in her husband, yet with respect to the goods of the testator, they will not be transferred by the marriage (Off. Exors. 87 ; Toll. Exors. 185 ; Co. Litt. 351; 1 Rop. Husband and Wife, 187); still for all this the husband is entitled to administer to her testator's effects in his wife's right, and this for his own safety, lest she should misapply the funds, for which he would be liable (*Arnold* v. *Bidgood*, Cro. Jac. 318; *Levick* v. *Coppin*, 2 Black. Rep. 801 ; S. C. 3 Wils. 277) ; nor will she be permitted to administer to them without his concurrence: (*Anon.* Salk. 282.)

### 5. *Assent of the Executor.*

Term will not vest absolutely without the executor's assent.

A term of years, although specifically bequeathed, does not, as I have just before remarked, vest absolutely in the devisee, until the executor has assented to the bequest; still, a legatee has such an inchoate right or interest in the term, that if he were to die before such assent was given, his interest would be transmissible to his representatives (Went. Off. Exors. 69; 2 Wms. Exors. 982);

and as such be subject to forfeiture, in case of the outlawry of the legatee: (Toll. 308.)

Assent may be express or implied.

This assent of the executor may be either express or implied, the law having prescribed no precise forms by which it is to be given, or from whence it is to be inferred. It seems, however, that if the executor informs the devisee that he intends him to take the term according to the will, it will be sufficient: (Shep. Touch. 456; *Hawkes* v. *Saunders*, Gow. 293; 2 Wms. Exors. 985.) An assent may also, it seems, be implied from the devisee of the term entering on the property, and exercising acts of ownership over it, without any complaint or objection by the executor: (*Richardson* v. *Giffard*, 1 Add. & Ell. 52; S. C. 3 Nev. & Man. 325.)

Assent to person taking life estate will enure also to those in remainder.

And if an executor assent to a bequest to one for life, this will enure equally to those in remainder; and, *è converso*, for the particular estate and remainders constitute but one estate: (*Welcden* v. *Elkington*, Plow. 251; *Lampet's case*, 10 Co. 47, b; *Adams* v. *Pierce*, 3 P. Wms. 12; Com. Dig. tit. Admon. C. 6.)

Assent to bequest of lease assent to condition annexed to it.

So an assent to a bequest of a lease for years is a consent to a condition or contingency annexed to it; as if a devise be to the testator's widow so long as she continues unmarried; and if she marry, then of a rent payable out of the land; the executor's assent of the devise of the term is an assent to that of the rent in case of the devisee's marriage: (*Goffe* v. *Haywood*, 1 Roll. Abr. 620, tit. Dev. E. pl. 2; S. C. 1 Roll. Rep. 247, 368; S. C. by the name of *Gough* v. *Howarde*, 3 Bulstr. 121; S. C. by the name of *Gouge* v. *Hayward*, Bridg. 52.)

Assent to bequest of leasehold premises, assent to a rent devised out of it.

So an assent to the devise of a chattel real is an assent to a devise of a rent out of it: (Com. Dig. Admon. c. 6.) But if a lessee for years bequeaths a rent to A., and the land to B., it has been doubted whether the executor's assent that

A. shall have the rent is an assent that B. shall have the land: (3 Bulstr. 122; Bridg. 55; Plow. 251, b.) However, it is said to be now established, that in this case also an assent to the bequest to one shall enure to the benefit of the other, on the ground that, as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro rata:* (1 Rop. Leg. 738, 3rd edit.; 2 Wms. Exors. 986.)

Assent of one executor, where there are several, is an assent of the whole.

The assent of any one of the executors, where there are several, is sufficient (2 Wms. Exors. 987); such assent may be given even before probate of the will (God. pl. 2, c. 20, s. 1; Went. Off. Exors. 82, 14th edit.), and, generally speaking, such consent, if once given, cannot afterwards be retracted; but, at the same time, it seems that if such assent has not been completed by possession, and its recall is unattended with injury to a third person, as to a *bona fide* purchaser from the legatee on the faith of such assent, it seems only reasonable that the executor under particular circumstances should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed which occasioned a deficiency: (1 Rop. Leg. 743, 3rd edit.; 2 Wms. Exors. 988.) But in no case would such retraction be allowed as against a *bonâ fide* purchaser for valuable consideration. If an executor refuses his assent without cause, a court of equity will compel him to give it: (Com. Dig. Admon. c. 6.

Personal representatives have

Executors and administrators have an absolute power of disposition over a term of years, of

an absolute power over a term of years.

which their testator or intestate died possessed, even although it be specifically bequeathed by his will, and may therefore sell and assign the same to a purchaser, who is not in anywise bound to see to the application of the purchase-money: (*Ewer* v. *Corbet*, 1 P. Wms. 148; *Burting* v. *Stonard*, 2 P. Wms. 150; *Nugent* v. *Giffard*, 1 Atk. 463; *Langley* v. *Oxford* (*Lord*), Ambl. 17; *M'Leod* v. *Drummond*, 17 Ves. 161; *Andrew* v. *Wrigley*, 4 B. & C. 125; Coote Mort. 198; Wms. Exors. 670.)

## SECTION IV.

### OF ATTENDANT TERMS.

1. *Practical Observations respecting.*
2. *As to the Presumption of Surrender or Merger.*
3. *Recent Enactments relating to Attendant Terms.*

### 1. *Practical Observations respecting.*

Investigation of title of attendant terms.

The title of an attendant term should be investigated as closely as the title to the fee. It should be ascertained that it was well created; that the *mesne* assignments were properly effected; that, where a will or intestacy occurs, the will was proved, or administration obtained in the proper court; and that no act has been done by which such term may be surrendered or merged. In small properties, indeed, a declaration of trust was often relied on as sufficient. This was a most unsafe practice, as it would have afforded no protection whatever against a subsequent purchaser, without notice, for valuable consideration, who had obtained an assignment of the term. It often also happens that several attendant terms are kept on foot; and whenever this occurs the title of the whole of them should be investigated, when, if it should appear that any of the elder terms are merged, or surrendered, or cannot be safely relied on,

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then it should be ascertained whether one of later creation can be confided in. An attendant term is often of the utmost importance to titles, as it will protect a *bonâ fide* purchaser for valuable consideration from all estates and charges made from the time of its creation down to the time of his purchase. This subject will, however, be more entered into when we come to treat of the equitable protection of purchasers.

### 2. *As to the Presumption of Surrender or Merger.*

Surrender.

It will be proper, nevertheless, to make a few brief observations here upon the presumed surrender, as also upon the merger of satisfied terms. With respect to the former subject, the question is by no means satisfactorily settled. It appears, however, to have been determined that where it was for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and that no beneficial purpose could be answered by the continuance of the term, a surrender might be presumed: (Selw. N. P. 699; Step. N. P. 1557; Roscoe, 429; *Doe* v. *Staple*, 2 T. R. 696; *Doe* v. *Sybourn*, 7 *ib.* 2.) Thus in *Doe dem. Burdett* v. *Wrighte* (2 B. & A. 710; S. C. 2 B. & Ald. 756), a term of 1,000 years was created by deed, in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that *to attend the inheritance*. A. died in 1741, and the estate remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for.

*Doe* v. *Hilder* considered.

The judge directed the jury to presume a sur-

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render, and on motion for a new trial, it was held, that under these circumstances, the direction was proper, and the jury were warranted, on ejectment brought for the premises by the heir-at-law, to presume a surrender of the term. In *Doe dem. Putland* v. *Hilder*, also, (2 B. & Ald. 782,) a term of years was created in 1762, and assigned over to a trustee in 1779 to attend the inheritance. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 he conveyed his life interest in the estate to a purchaser as a security for a debt; but no assignment of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the original trustee to a new trustee for the purchaser in 1816. On ejectment brought against the purchaser by a prior incumbrancer, the judge directed the jury to presume a surrender, and the jury having found accordingly, a rule *nisi* was granted for a new trial; and, after argument, it was holden that the direction was right, and that the jury were warranted in presuming that the term had been surrendered before 1819. The correctness of this decision was, however, disapproved of by Richards, C. B., Graham, B., and also Lord Eldon (see note *a*, 2 B. & Ad. 577); the latter of whom, in alluding to the case of *Doe* v. *Hilder* (*suprà*), said, he had no hesitation in declaring that he would not have directed a jury to presume the surrender of the term in that case; and for the safety of titles to landed estates in this country, he thought it right to declare that he did not concur in the doctrine laid down in that case. And in *Doe dem. Blacknell* v. *Plowman* (2 B. & Ad. 573), in which both *Doe dem. Burdett* v. *Wrighte* and *Doe* v. *Hilder* were cited, Lord Tenterden, C. J. said, the doctrine laid down in those cases had, he believed, been much

questioned, and which, he said, was directly in point in the case then before him; and as he and the rest of the court there decided against the presumption of the surrender, the former decisions may now be considered as overruled. *Doe dem. Blacknell* v. *Plowman* was shortly as follows:—In 1772, a term of 1,000 years was created by deed, for the purpose of securing a sum of 5,000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the persons who created the term. In 1789, the premises were conveyed to the purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs or assigns, or as he should appoint, and in the meantime *to attend the inheritance.* The purchaser entered into the possession of the premises, and continued so possessed till her death. In 1808, she executed a marriage settlement, reserving to herself a power of appointment by deed or will, and after the marriage she, in 1815, devised all her real estate. Neither in the marriage settlement, nor in the will, was any mention made of the term of 1,000 years. She and her husband having both died, it was holden, on ejectment brought by her heir-at-law, that there was no ground whatever for presuming that this term, *which was assigned to attend the inheritance*, was ever surrendered. Neither will the mere circumstance of the term having been satisfied afford sufficient ground for a jury to presume its surrender: (*Evans* v. *Bicknell*, 6 Ves. 185, Rosc. Ev. 430.) To authorize such a presumption, there ought to be some dealing with the term. Upon the whole, therefore, it seems that if a term has been once expressly assigned to attend the inheritance, subsequently to which no act has been done inconsistent with its existence, there will be no ground for presuming it to be

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surrendered on account of mere lapse of time, and the silence of the party entitled to the inheritance concerning it. It may be proper also to remark, that a deed, purporting to be an assignment of an old term, may, if that term by any accident has ceased, operate as the creation of a new one: (*Dean* v. *Kemys*, 9 East, 336; *Doe* v. *Brooks*, 3 Ad. & Ell. 513.) It has sometimes happened that the trustee of a term has had the freehold conveyed to him in order to make him a tenant to the *præcipe* for the purpose of suffering a recovery, whence questions have arisen as to whether or not the term became merged; but it has been decided that the term would not become actually drowned, but merely remain in a state of suspended animation until resuscitated by the recovery being duly perfected: (*Ferrors* v. *Fermor*, 2 Roll. Rep. 245; S. C. Cro. Jac. 643; *Teme's case*, 1 Ventr. 280, cited.)

### 3. *Recent Enactments relating to Attendant Terms.*

Satisfied terms to cease after 31st of December, 1845.

By the recent statute 8 & 9 Vict. c. 112, every satisfied term of years, which either by express declaration, or by construction of law, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been

assigned or dealt with after the 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and equity to be a subsisting term: (sect. 1.)

All satisfied terms to cease after 31st of December, 1845.

By the section immediately following (sect. 2), it is also enacted, that every term of years then subsisting, or hereafter to be created, becoming satisfied after the 31st day of December, 1845, and which, either by express declaration, or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

The operation of this statute seems to be, that an outstanding term made attendant upon the inheritance by express declaration before the 31st of December, 1845, is still to be considered as existent, for the purpose of such protection, to all persons, as it would have afforded to them before the passing of this act. Such terms, therefore, must hereafter be deemed existent or non-existent at the time of any ejectment, as the same shall or shall not afford a protection within the meaning of the act to the party setting up the term, so that a surrender cannot in such case be presumed; and with respect to all other cases, it is expressly declared, that a satisfied attendant term, subject of course to any questions as to whether it constitutes a satisfaction, is *ipso facto* determined, and consequently, it is unnecessary to call in the aid of the doctrine of presumed surrender: (Ad. Eject. 68, 4th edit.)

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